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IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term

Case No. 76-1378

ROGER L. WHITESEL, Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Of counsel:

Robert Muncaster
Esther Muncaster

Deatsville, Alabama 36022

Pro se:

Roger L. Whitesel

2709 Fleming Road
Middletown, Ohio 45042

~~20 EW~~ 20 C.C 2145

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI ----- 1

I. OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS ---------- 2

II. JURISDICTIONAL STATEMENT ------- 2

III. JUDGMENT TO BE REVIEWED ------- 3

IV. QUESTIONS PRESENT FOR REVIEW -- 3

V. APPLICABLE LAW, etc. ---------- 4
(see Appendix "F")

VI. STATEMENT OF THE CASE ---------- 5

VII. ARGUMENT:

A. ASSISTANCE OF COUNSEL ------- 13

B. ELECTION OF COUNTS ---------- 25

C. ILLEGAL JOINDER ---------- 31

D. DUPLICITOUS COUNTS I & III ---- 46

E. TAX LIABILITY/COUNTS I & III -- 56

F. TAX LIABILITY/COUNT V ------- 58

G. FAIR TRIAL & TAX LIABILITY --- 60

H. WILLFULNESS/COUNT V. ------- 64

I. WILLFULNESS/COUNTS I & III. --- 69

TABLE OF CONTENTS - continued

VIII. CONCLUSION ---------- 75

IX. PRAYER ---------- 76

Certificate of Service ---------- 76

APPENDIX:

Judgment of the 6th Circuit ---------- "A"

Order , denying Rehearing ---------- "B"

Affidavit of Gordon C. Peterson ------- "C"

American Colonial Charters ---------- "D"

Intelligence Memorandum - IRS -------- "E"

Applicable Law, etc. ---------- "F"

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Case No.

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THE UNITEDSTATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

To: The Chief Justice, and, the Associate Justices of the Supreme Court of the United States of America.

Comes, now, Roger L. Whitesel, petitioner pro se, who petitions this Court to issue a writ of Certiorari to the U. S. Court of Appeals for the Sixth Circuit.

As grounds, the Petitioner Whitesel shows the Court as follows:

I.
OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The unofficial report of the Opinion of the Court of Appeals for the Sixth Circuit in U.S. v. Whitesel, decided and filed October 22, 1976, Case No. 75-1648, may be found in 543 F2d 1176.

The decision of the Court of Appeals is attached hereto as Appendix "A".

To Petitioner's knowledge there has been no unofficial report made of the denial of Petitioner's "Motion for a Rehearing" filed on February 7, 1977.

The Order of the Court of Appeals is attached hereto as Appendix "B".

II.
JURISDICTIONAL STATEMENT

Jurisdiction is obtained under Amendment I., U.S. Constitution - the right to petition the Government for a redress of grievances, and, under Amendment IX. - the right to have the issuance of a writ of Certiorari under the Common Law.

Jurisdiction is also obtained under Statutory Law as set out in 28 U.S.C. 1651 and 1254.

Jurisdiction if further obtained under Statutory Law as set out in 28 U.S.C. _____ allowing the Supreme Court to make their own Rules.

Rule 19 is invoked requiring the Court's power of supervision over the Courts of Appeals when such Court has rendered a decision in conflict with the decision of another court of appeals

on the same matter; and has decided an important question of Federal law which has not been, but should be, settled by this Court; and has decided a Federal question in a way in conflict with applicable decisions of this Court; and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the District Court.

III.
JUDGMENT TO BE REVIEWED

The Judgment to be reviewed was decided and filed on October 22, 1976, wherein the Sixth Circuit Court of Appeals vacated the sentence on Counts II. and IV. and affirmed the judgment of conviction on Counts I., III., and V. See attached Appendix "A",

The Order denying Petitioner's Motion for ReHearing is dated February 7. 1977. See attached Appendix "B"

IV.
QUESTIONS PRESENTED FOR REVIEW

A. ASSISTANCE OF COUNSEL:
   Whether the Petitioner was fatally prejudiced by his being denied assistance of counsel.

B. ELECTION OF COUNTS:
   Whether the Government was bound by Law to make an election whetherto prosecute on Counts I. and III. or on Counts II. and IV. prior to Trial.

C. ILLEGAL JOINDER:
   Whether the Petitioner was fatally and erroneously prejudiced by the joinder of Counts I., II., III., IV. and V.

D. DUPLICITOUS COUNTS I. and III.:
Whether Counts I. and III. (failure to make a tax return) were duplicitous.

E. TAX LIABILITY / COUNTS I. and III.
Whether "tax liability" was material to the offense charged in Counts I. and III.

F. TAX LIABILITY / COUNT V.:
Whether "tax liability" was material to the offense charged in Count V. ("false"W-4E).

G. FAIR TRIAL & TAX LIABILITY:
Whether a determination of Petitioner's "tax liability" was necessary - if any there was - to assure a fair trial.

H WILLFULNESS / COUNT V.:
Whether the Instructions to the Jury were in conformance with the Garner Decision and the Bishop Decision.

I. WILLFULNESS / COUNTS I. & III.:
Whether the Instructions to the Jury were in conformance with the Garner Decision and the Bishop Decision.

V.

APPLICABLE LAW, ETC.

See Appendix " F "

STATEMENT OF THE CASE

On October 7, 1974, a five-Count INDICTMENT was filed against the Petitioner in the U.S. District Court for the Southern District of Ohio, Western Division. Case No. 75-1638, U.S. v. Roger L. Whitesel.

Count I. and Count II. of the INDICTMENT charged the Petitioner respectively with:

> . . . willfully and knowingly fail-(ing) to make (an) income tax return (for the Year 1972)

and, for the same Year 1972 with:

> . . . willfully and knowingly fail-(ing) to supply . . . information on a Form 1040, other than his name, address, social security number, and the statement, "under protest, I plead the Fourth and Fifth Amendments to the United States Constitution".

Counts III. and IV. of the INDICTMENT charged the Petitioner respectively with:

> . . . willfully and knowingly fail-(ing) to make (an) income tax return (for the Year 1973)

and, for the same Year, with:

> . . . willfully and knowingly fail-(ing) to supply . . . information on a Form 1040, other than his name, address,

social security number, occupation, number of exemptions, signature, and the statement, "Object, See Attachments".

Counts I., II., III. and IV. are offenses under 26 U.S.C 7203.

Count V. [1/] of the INDICTMENT charged that the Petitioner had, on or about August, 1972:

> . . . willfully suppl(ied) a false and fraudulent statement by submitting an EXEMPTION FROM WITHHOLDING CERTIFICATE Form W-4E to Valley Sheet Metal Works, Inc., on which he claimed that he incurred no liability for Federal income tax for the year 1971 and that he anticipated he would incur no liability for Federal income tax for the year 1972, whereas, . . . he inccured a Federal income tax liability of $3316.21 for the year 1971 and that he would incur a similar Federal income tax liability for the year 1972.

Count V. is an offense under 26 U.S.C. 7205.

Arraignment was held on October 15, 1974. Petitioner appeared with his Counsel of his

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1/ The Government had originally proceeded against the Petitioner by INFORMATION but only on Count V. - false and fraudulent W-4E Form. However, on motion of the Petitioner, the Court dismissed the Case since the INFORMATION failed to be supported by Oath in accordance with the 4th Amendment. See U.S. v. Whitesel, Case No. CR 174-25, D.C., So. Dist. Ohio.

choice, whom the Court forbid to speak for the Petitioner. The court entered a plea of "Not guilty" since the Petitioner declined to plead.

Various pre-Trial motions were filed by the Petitioner. Among these were:

1. Motion to Quash Indictment by the Grand Jury, in which the Petitioner, in part, moved the Court to sever the Counts stating, "That to include Count(s) II., III., IV. and V. with Count I. constitutes a misjoinder of actions, and as such would be extremely oppressive in nature". (R-13) [2/] and (PT-3:3 and PT-26:11) [3/]

On October 24, 1974 District Judge Hogan denied this Motion. (R-14)

2. Motion to Dismiss Criminal Charges on Constitutional Grounds the substance of which required a Hearing by the Court on Petitioner's Constitutionally guaranteed rights including but not limited to the 5th Amendment protection which he had invoked on his 1972 and 1973 Tax Returns - the Returns for which he stood charged for not making in Counts I. and III. (R-16)

On October 30, 1974, the Court denied this Motion. (R-17)

2/ The letter "R" of (R-13) refers to the Record of the Case. The numerals refer to the pagination of the Record.

3/ The letters "PT" refer to the Pre-Trial Hearing. The numerals preceding the colon refer to the page number, and, the following numerals refer to the line number.

3. Motion for Court to Recognize Constitutional Right to Enjoy Assistance of Counsel, Licensed or un-Licensed, (R-20) and Memorandum, (R-22).

On November 18, 1974, the Court denied this Motion. (R-24)

On Tuesday, February 4, 1975, a Pre-Trial Hearing was had on "preliminary matters".

During this Hearing, the Petitioner moved the Court to dismiss the charges on the grounds that he had relied in good faith upon his rights as guranteed by the U. S. Constitution, and upon previous decisions of this Supreme Court as well as other decisions of Federal Courts and on statements made by Federal Judges and other Government Officials. (PT-18:4 through PT-21:11)

This motion was denied by the Court on the grounds that his good faith challenge would go to the question of "willfulness". (PT-21:12, 19)

During this same Hearing, the Trial Judge informed the Petitioner that Counts II. and IV. - failure to supply information upon an IRS Form 1040 would be alternate charges to Counts I. and III. - failure to make a tax return.

The Petitioner renewed his motion to sever the Counts stating: ". . . if willfulness is a jury question, shouldn't these Charges be separated?" (PT-26:11)

However, the Trial Judge refused by stating: "They will be separated. This Jury will be told to consider each of these separately . . ." (PT-26:13)

On Wednesday, February 5, 1975, the

Jury Trial commenced and continued all day. The Judge then continued the Trial on Friday, February 7th, at which time the Prosecution and the Defense rested. The Jury was charged.

On this day, February 7th, the Petitioner filed a Motion to Dismiss (R-45). Later on the same day in Open Court, the Petitioner renewed this Motion and was overruled by the Court.

The Jury started its deliberation after returning from the Weekend, on Monday, February 10th at 9:30 a. m. The Jury continued its deliberation all day, returning the next day at 9: 30 a. m. At 10:42 a. m. on this Tuesday, the Jury returned a verdict of "Guilty" on all 5 Counts of the INDICTMENT.

On Feb. 20th Whitesel filed some motions; one, being a Motion to Arrest Judgment. (R-51)

The Docket Sheet [4] shows that this Motion was denied by the Court. (R-52)

Sentencing was held on Friday, February 28, 1975. The Court made the following sentence:

Count V. - 1 year and a fine of $500. 00;

Count I. - 6 months consecutive to Count V. and $500. 00 fine;

Count II. - 6 months consecutive to Count V. and concurrent with Count I. and $500. 00 fine;

Count III. - 6 months consecutive to Counts I. and V. and $500. 00 fine in addition to Counts I and V.;

Count IV. -6 months concurrent with Count III. and consecutive to Counts I. and V. and $500. 00 fine, remitted.

On March 7, 1975, the Petitioner timely filed his Notice of Appeal.

The Case was docketed in the Sixth Circuit Court of Appeals as case no. 75-1648. The BRIEF OF APPELLANT was due on July 19, 1975.

However, twelve days before the BRIEF was due, the Petitioner submitted various motions to the Court - all seeking relief necessary to the filing of his BRIEF. One of these motions was the the Motion to Withdraw the Record and Exhibits, which the Court denied. As a consequence, the BRIEF OF APPELLANT was filed without a complete record of the case on August 24, 1975.

Other motions were filed on July 14, 1975., which were also denied by the Court.

On August 5, 1975, the U.S. Attorney filed a Motion to Dismiss on the grounds that the Petitioner had failed to file a timely brief.

In response, On August 11, 1975, the Petitioner filed his Answer to Motion to Dismiss & Motion and a Motion to Strike.

On the latter Motion, the Petitioner prayed that the Sixth Circuit would strike the Motion to Dismiss from the Record and the name of the U.S. Attorney as counsel for the United States on the grounds that the Code of Federal Regulations required all Tax appeals to be handled by the Tax Division, Department of Justice, Washington, D.C.

By the time of Petitioner's filing the BRIEF OF APPELLANT none of these motions had been disposed of by the Court.

The Court continues to ignore Petitioner's Pleadings.

On October 8, 1975, the U.S. Attorney, contrary to law, filed a BRIEF OF THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE (sic)

On January 21, 1976, the Petitioner timely filed his REPLY BRIEF OF APPELLANT, after being granted an extension of time.

In February, 1976, an oral Hearing was had before the Sixth Circuit Court of Appeals at which Petitioner appeared pro se.

Later on in the Year, on October 22, 1976, the Sixth Circuit filed its Opinion in which it vacated the convictions on Counts II. and IV. "on the grounds of merger" and affirmed the convictions on Counts I., III., and V. See Appendix "A"

On December 2, 1976, Petitioner timely filed his Motion for Rehearing with accompanying Arguments.

Then, on February 7, 1977, this Motion was denied by the Court of Appeals, however, erroneously stating in its Order that:

> Noting in said motion no argument which had not been previously considered by the panel which decided the appeal.
> Said motion is hereby denied.

See Appendix."B"

On February 9, 1977, the Petitioner filed his Motion to Stay the Mandate and Extension of Time in the Court of Appeals. In this Motion the Petitioner informed the Sixth Circuit that he in-

8.

tended to apply to this Court with a Petition for a writ of certiorari.

Following, the Petitioner moved this Court for an extension of time in which to file his Petition, which was granted by Justice Stewart to April 8, 1977. (No. A-705)

A. ASSISTANCE OF COUNSEL [1]

Whether the Petitioner was fatally prejudiced by his being denied assistance of counsel.

Petitioner Whitesel was denied by the Trial Judge assistance of counsel in violation of his Sixth Amendment right [1] during Arraignment and during the entire Proceedings. (See Pre-Trial Motions (R-22) and the Court's denial (R-24).

This District Judge permitted an Accountant to "advise" the Petitioner by permitting him to sit at the Counsel Table with the Petitioner. (PT-6:23). However, the Accountant was not allowed to assist by speaking or objecting,or to participate in any way in the Trial Proceedings.

On Appeal, the Court of Appeals for the Sixth Circuit ruled that: (Appendix"A", at 8)

> . . . We find no abuse of Appellant's Sixth Amendment rights.

Earlier, the Sixth Circuit had opined:(at 3)

> . . . It is Appellant's contention, however, that the Sixth Amendment right

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1/ The 6th Amendment to the U. S. Constitution states:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

to "counsel" did not in 1789, and does not now, pertain to members of the Bar, but should be construed as allowing for the advice and participation of a friend of the accused who is not a lawyer.

The Court of Appeals erroneously claimed that: (at 3, Appendix "A")

> This argument has decisively been rejected by three of the Courts of Appeals which have considered the issue.

The three Courts of Appeals to which the Opinion refers are the Fifth, District of Columbia and the Seventh Circuit. All the Cases cited are distinguished from the Petitioner's. The Sixth Circuit misapprehended the law.

In the Petitioner's Argument[2/] contained in his Motion for Rehearing to the Court of Appeals the Petitioner brought to the attention of the Court that they had misapprehended the law and facts on the issue of Counsel - that the Cases cited by the Sixth Circuit were not in point or totally void of "authority in support of its holding".[3/]

In answer to Petitioner's Motion for Rehearing, the Sixth Circuit failed and refused to consider the new and original arguments present-

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2/ See The First, Sixth and Ninth Amendment Right to Assistance of Counsel, p. 1, Argument.

3/ quoted from the Opinion of U.S. District Court Chief Judge Garza in Turner v. American Bar Ass'n, 407 FSupp 451, at 472, footnote 12.

ed in Petitioner's Motion for Rehearing and totally ignored the attached Affidavit of Gordon C Peterson - "counsel" for Thomas Stockheimer[4/] - which showed that Peterson had participated fully throughout the Trial Proceeding as "counsel". for Stockheimer, See Appendix "C"

AFFIDAVIT

STATE OF MINNESOTA

ss

COUNTY OF HENNEPIN

GORDON C. PETERSON, being first duly sworn upon oath, deposes and says: That he is the Gordon C. Peterson who acted as assistant to Thomas Stockheimer in the Trial before James E Doyle Federal District Judge for the United States District Court for the Western District of Wisconsin, Case No. 74-CR-72 (United States vs Thomas F. Stockheimer, 74 CR 72: That Affaint (sic) acted as such assistant to Thomas Stockheimer pursuant to an Order of Judge Doyle dated December 4, 1974.

As such assistant Affiant was permitted to make the Opening Argument to the Jury; Affiant sat at the Counsel Table with the Defendant conducted the cross examination of the Government Witnesses; made objections to the Court on improper testimony conducted the examination of the Defendant and all of the Defendant's Witnesses; made the closing argument in

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4/ U.S. v. Stockheimer, 385 F. Supp 979, (1974)

fact Affiant did everything that any lawyer would do but with this distinction, Affiant was only an assistant, was only the Defendant's spokesman. At no time would Judge Doyle speak to Affiant without the Defendant Stockheimer being present. Stockheimer was present at all discussions at the Bench during the Trial; and at all conferences in Court Chambers. Judge Doyle considered Affiant not as Stockheimer's attorney nor even his agent, as no agency was created; Affiant was only doing what Stockheimer would do in defending himself as his own attorney pro se. Stockheimer was speaking and conducting his own Trial through the person of Gordon Peterson as his spokesman; his voice, his mind, and the conveyor. It was if Stockheimer was speaking and acting throught (sic) his own shadow who was Gordon Peterson.

Further Affiant Sayeth Not.

s/ Gordon C. Peterson

Subscribed and sworn to before
me this 24th day of Nov. 1976
s/ Kurt F. Walther
Notary Public
("seal" of Notary Public)

Instead, the Sixth Circuit Opinion said that the manner in which Peterson had counseled was the "same arrangement allowed by the District Judge in our Case." (see footnote 3, at 8)

This was not a correct statement. The "arrangement" was not the same. The Sixth Circuit errs, and, the Affidavit of Peterson proves it. Petitioner's Counsel was muzzled; Stockheimer's Counsel was not. 5/

Yet, the Sixth Circuit, in error, denied Petitioner's Motion for Rehearing stating: (Appendix "B")

> Noting in said motion no argument which had not been previously considered by the panel which decided the appeal.
> Said motion is hereby denied.

The Court of Appeals further stated in its Opinion that there was: (at 6)

> . . . No suggestion of conflict between the meaning of the Sixth Amendment and Section 35 is advanced in the briefing of this appeal, nor has our research developed any. . . . First, since in the Statute the terms "counsel or attorneys at law" are employed alternately, it seems probable that the proposers of the Sixth Amendment did not mean to limit representation exclusively to "attorneys at law". Second, the Statute clearly provides for the rules of the courts of the United States to determine who shall "be permitted to manage and conduct causes therein". By this language Congress recognized the Constitutional power given the Federal Judiciary by by the then recently adopted Constitution, Article III.

5/ As a result of the Stockheimer Case, Peterson was prosecuted and convicted in Federal Court. On appeal the conviction was recently reversed. See U.S. v. Peterson, ___F2d____(C.A. 7, 19___) Where Peterson was exonerated of the conviction of practicing law without a license.

As a consequence of this holding, the Sixth Circuit looked to the Rules of the United States District Court in which Petitioner had been tried and opined that the phrase "(u)nless otherwise ordered" found in Rule 3. 0. 1 gave the District Judge the "discretion to deal appropriately with any extraordinary case". The Sixth Circuit continued in this Opinion stating: (at 8)

> . . . But for a District Judge to exercise his discretion to allow a person to try a case who was not a member of the Bar of the Court and who had not qualified by taking the required examination, would at a minimum require a showing that such person was sufficiently learned in the law to be able adequately to represent his client in court. In our instant case the District Judge was asked to allow an Accountant with no training in law to try the case. In denying that request he allowed Appellant to exercise his right to try the case himself, with the Accountant seated at the Counsel Table to advise with him throughout the trial. We find no abuse of Appellant's Sixth Amendment rights.
>
> (underlining added for emphasis)

Petitioner, however, argues that the District Judge abused his discretion, failing and refusing to consider any factual test of competence but formal admission to the Bar, and the Court of Appeals compounded the District Court error in finding "no abuse of discretion".

The Court of Appeals erroneously found that Petitioner had asked to have an Accountant "with no training in the law to try the case", that is, to represent him as do members of the Bar -

licensed lawyers. (at 8, quoted above)

The District Court Record shows that Thiel, the accountant, was not permitted to assist the Petitioner not because he had "no training in law"[6/] but, rather, because Thiel was "not a member of the Bar of this or any other Court" (R-24). Furthermore, there was no Hearing held by the District Court to determine if Thiel was or was not "learned in the law" or, if he had had any training in the law". Instead, assistance of Counsel was denied summarily.

Petitioner's Motion for Rehearing pointed out to the Appeals Court that it was confusing "representation: with "assistance" of counsel.

Petitioner did not ask for Thiel to "try the case". As this Supreme Court said in Faretta v. California, 43 LW 5004: (at _____)

> It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many cases. (Citations omitted here)

Instead, Petitioner was only asking the District Court for the right to ".plead and manage (his) own cause( ) personally (with) the assistance of . . . counsel". See Sec. 35, Judiciary Act of 1789 (Chap. 20, §35, 1 Stat. 92, now codified as 28 USC

6/ a determination made without the taking of evidence.

1654 (1970)[7]

As this Supreme Court further said in Faretta, supra: (at _____)

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation", who must be accorded "compulsory process for obtaining witnesses in his favor". Athough not stated in the Amendment in so many words, the right of self-representation -- to make one's own defense personally -- is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequence if the defense fails.

Petitioner contends that if this Court, in Faretta, supra, held that a State could not force a lawyer upon a Defendant Party since "(t)he right to defend is given directly to the accused", then, Petitioner should have been granted the assistance

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7/ The amendment to this Section alters the phrase "by the assistance of such counsel or attorney at law" to read only"by counsel". This alteration is repugnant to the U.S.Constitution, Amendment Six.

of Thiel - to counsel him, "for it is he (the Petitioner) who suffers the consequence if the defense fails".

Petitioner further contends that by being deprived the active participation of the Accountant "counsel"[8] he was deprived the right of making his own defense from the Witness Stand - under Oath!

If he had taken the Witness Stand, there would have been no one tc object for him on cross-examination when the Prosecutor asked predictable self-incriminating questions for the purpose of prejudice and conviction, whether admissible by the rules of evidence or not.[9]

The District Judge had previously warned the Petitioner on the Record that the public looked unfavorably on anyone who would exercise his

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8/ The Trial Judge said, during the Pre-Trial Hearing that: (PT-6:23)

"So that while you are going to be permitted during this Trial to have the benefit of an advisor at the Counsel Table with you, the purpose of that is so that you can seek on-the-spot advice at the Table. Your advisor will not be permitted to speak in this Courtroom, address either this Court, the Jury or any Witness. . . .

9/ See Brief of Appellant, III-Relevancy of Evidence, wherein the Petitioner argued that the U.S Attorney not only presented evidence which was inadmissible but conducted his Opening Statement in an unprofessional and fatally prejudicial manner.

Fifth Amendment privilege when he said in the Pre-Trial Hearing that: (PT-8:18)

> THE COURT: You are also aware, I am sure, of the Fifth Amendment That is the "do-nothing" part that most people, lawyers or not lawyers, are aware of, You have an absolute right as the defendant to withhold yourself from the Witness Stand in this Case, and you are entitled to have this Jury told that that is the exercise of your right and that the Jury is not to take that into consideration in passing on your guilt or innocence -- the fact that you have exercised your Fifth Amendment rights. The Fifth Amendment has gotten so unpopular in recent years that sometimes people don't want Juries told that, so we will leave that entirely up to you.
> . . .

The Trial Judge was aware of the Fifth Amendment peril and deliberately deprived the Petitioner of counsel who could have exercised the privilege by objection for the Petitioner.

If the exercise of privilege is potentially prejudicial with counsel to assert it, how much more would it have been if the Petitioner had taken the Witness Stand in his own defense, and, on cross-examination, vocally exercised his Fifth Amendment right? Petitioner could not afford to take that risk without counsel to object, and the Trial Judge knew it

As a consequence, Petitioner could not take the Witness Stand in his own defense since his "counsel: had been muzzled -

prohibited from objecting on cross-examination to the predictable inadmissible and self-incriminating questions raised by the Prosecutor

The proximate result was abject denial of Due Process to the Petitioner: He was deprived of the right to effectively manage and conduct his own defense. He was denied his Ninth Amendment right to justice without purchase or delay [10] He was denied his First Amendment right to assemble peaceably with George Thiel, his choice of counsel; to petition the Government for redress of grievances, and assert his Fifth and Sixth Amendment rights.

The Sixth Circuit judicially notes that neither its Circuit nor the Supreme Court has ever passed upon the precise question presented by Petitioner; to wit: Does the Sixth Amendment provide the unqualified [11] eight to enjoy the assistance of counsel? The Opinion states: (at 4)

> Nonetheless, the question posed by this Appeal remains open for our consideration, since it has never been passed upon either by this Court or by the United States Supreme Court. . . .

Petitioner contends that under the facts and circumstances of this Case that the Sixth Circuit erred in finding no abuse of discretion by the Dis-

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10/ See Magna Charta, (40 and see also 45) which is protected by the Ninth Amendment.

11/ See Chandler v. Fretag, 348 US 3. which states: ". . . his right to be heard through his own counsel is unqualified."

trict Court. The Court of Appeals has erroneously ruled in conflict with Federal Law and also the U. S. Constitutionally protected rights of the Petitioner. The Appeals Court has so departed from the accepted and usual course of judicial proceedings by reading "assistance of counsel" but of its historical context [12]/ and upholding the error of the District Court in this matter, that the Supreme Court must supervise their actions and correct the injustice done to Petitioner Whitesel.

Petitioner so moves.

12/ See Reply Brief of Appellant, I. Right of Counsel, pp. 1-10, wherein Petitioner presented the Sixth Circuit Court of Appeals American Colonial Charters which proved that "assistance of counsel" could mean a friend or neighbor. See Appendix "D"

B
ELECTION OF COUNTS [1]/

Whether the Government was bound by Law to make an election whether to prosecute on Counts I. and III or on Counts II. and IV. pror to trial.

The Indictment in Petitioner's Case was returned on October 7, 1974, charging the Petitioner, first with FAILURE TO MAKE a tax return at the times prescribed by law (Counts I. and III.) and, secondly, with FAILURE TO SUPPLY information upon an IRS Form 1040 (Counts II. and IV,) for the Years 1972 and 1973, respectively. (26 USC 7203)

Petitioner contends that the Government had no lawful authority to charge him and simultaneously try him for both the FAILURE TO MAKE and FAILURE TO SUPPLY information after his timely objection noted in the Record (R-13) see also (PT-3:3). Petitioner further contends that these Charges were intentionally and willfully combined to prejudice and confuse the Jury into returning a conviction against the Petitioner. The unlawful combination of Counts did not come by accident or ignorance. The facts bear out this contention, to wit:

1/ "Election of counts" means: "The doctrine under which the prosecution may be required to elect on which charge it will proceed to the trial under an indictment which is in two or more counts for separate and distinct offenses. 27AmJ1st Indict §133. . . . Ballentine's Law Dictionary.

At the time the Indictment was returned against the Petitioner, on October 7, 1974, the question of election on these IRS Charges had been raised and settled for more than a year in the case of U. S. v Radue, 486 F2d 220 (C. A. 5, 1973) where the Fifth Circuit Court of Appeals wisely said: (at 222)

> Radue's most substantial contention is the second, namely that the two Counts contained in the Information were duplicitous. Because Radue filed a blank form 1040 as a protest, the Government was faced with a dilemma. Since a "blank" 1040 form does not constitute a return, . . . the Government could elect to prosecute for failure to file. Conversely, since a blank form obviously omits certain information, the Government could elect to prosecute for failure to supply information. . . .
>
> (underlining added for emphasis)

The Radue case, supra, should have settled the matter for the Prosecutor and the Court. The Fifth Circuit Court of Appeals told the Government that it had to make an election, i. e. whether to prosecute for FAILURE TO MAKE a return or, whether to prosecute for FAILURE TO SUPPLY information. The refusal of the Prosecutor to do so in Petitioner's case was a deliberate attempt by the Government to flaunt the law, prejudice the Jury, and insure conviction with the active participation of the Trial Judge. 2/

2/ Let this Court take Judicial Notice that the IRS instructs Federal Judges how to punish "tax protestors" and stresses the "compliance problem" in our "voluntary" income tax system. See Appendix "E".

Obviously, the Prosecutor was retaliating against the stinging legal defeat he had suffered at the hands of the Petitioner, acting pro se with George Thiel's help, to wit:

Petitioner had successly attacked a prior criminal Information pending against him and forced its dismissal. This single count Information filed on April 12, 1974, 3/ charged the Petitioner with making a false and fraudulent statement upon the IRS Form W-4E, "Exemption from Withholding Certificate" (26 USC 7205). There was no sworn Affidavit supporting this criminal Information to show Fourth Amendment authority for the Petitioner's illegal arrest at the instigation of the vindictive U. S. Attorney., and, consequently, the District Judge was forced to grant the Petitioner's motion to dismiss. Later on, in this case at Bar, this dismissed Charge became Count V. of the massive, prejudicial Indictment returned against the Petitioner to punish him for his legal prowess.

After the landmark Jury acquittal of Alvin Borchardt 4/ on an identical charge in Miami, Florida the prosecution policy of the Government shifted radically to guarantee confusion, prejudice and conviction by the addition of counts of failure to make a return (26 USC 7203) and of failure to supply information (26 USC 7203) joined

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3/ See U. S. v Whitesel, Case No. CR 174-25, U. S. D. C., So. Dist. Ohio.

4/ See U. S. v. Borchardt, Case No. _____ U. S. D. C., So. Dist. Florida.

with the "false" W-4E count (26 USC 7205). 5/ in an Indictment against Whitesel, the Petitioner.

It has also been the policy of the Government to prejudicially charge Tax defendants with both failure to make a return and with failure to supply information if the evidence of the one is considered insufficient to obtain a conviction from the Jury.

Proof of these tactics is revealed in an Official letter from Henry C. Stockell, Jr., IRS Regional Counsel to Scott P. Crampton, Asst. Atty. General, Tax Division, Washington, D. C., dated October 2, 1972, recommending criminal prosecution in the H. Byron Gaar Tax case. 6/ A portion of this Letter follows:

> In transmitting the Case to this office, the District Director also recommended that Taxpayer be prosecuted for willful failure to supply information inviolation of Code, § 7203, for the Years 1966 through 1971. This office is of the opinion that the evidence of failure to file is so clear and convincing that there is no need to include the willful failure to supply information charges. The Government has encountered some difficulty in attempting to combine charges of failure to file with failure to supply information. See the recent case of Dr. William C. Douglass, ATL-E-1531. 7/
>
> (underlining added for emphasis)

5/ A mountainous obstacle, when under the legitimate rules of evidence and case law, the issue of "tax liability" is material to one count and immaterial to the other count. See Argument, here, entitled: "Illegal Joinder"

6/ See U. S. v. Gaar, Case No. 73-B-394, U. S. D C., So. Dist. Texas.

The Radue case, supra, should have settled the matter once and for all, but the Prosecutor and the Trial Judge ignored it.

The matter of election is pursued further in in U. S. v. Chrane, 529 F2d 1236 (CA5, 1976) where the Fifth Circuit said: (at 1237)

> Chrane's final contention is substantial. He argues that Counts One and Three, charging failure to file 1040 Returns, and Counts Two and Four, charging failure to supply information on the Form 1040's for the same Years, were multiplicitous and prejudicial. . . . We agree with Chrane. . . .

and continuing, where Judge Godbold rightfully states: (at 1238)

> . . . The two offenses here are coterminous, in effect one offense with two labels. Defendant cannot be convicted of both, and the conviction should be on only Counts One and Three or Counts Two and Four. The Case must be remanded. On remand the Government must elect whether

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7/ See U. S. v. Douglass, 476 F2d 260 (C. A 5, 1973).

it wishes to leave in effect the convictions on Counts One and Three or those on Counts Two and Four. The Government having elected, the Court must then vacate the convictions on the other two Counts and resentence the Defendant.

The Petitioner's case, here, is slightly distinguished from Chrane's, supra: Chrane did not seek separate trial of the Counts. The District Judge in Chrane's case did not promise to treat the Charges "in the alternate". When Whitesel[8/] raised the issue of the prejudicial joinder the Court said: (PT-3:3)

> THE COURT: Now, there are four Charges under that Section (7203) in this Indictment. They are alternate, however. The Counts with respect to failure to give information, in respect of each of those, two years are alternate charges, . . .
> (underlining added for emphasis)

Did the Petitioner's Trial Judge instruct the Jury that Counts II. and IV. were "alternate charges" to Counts I. and III. ? No! As a direct consequence of the lawless joinder, the Jury returned a verdict of conviction on all four Counts (I. - IV.), and the Trial Judge sentenced on all four Counts.

In the Opinion of the Court of Appeals in

8/ Petitioner Whitesel had moved the Trial Court to sever the Counts. The Court denied this motion. (R-14). See following Argument, entitled, "Joinder" pp. 31-45

Petitioner's case, the Court vacated the Sentence for Counts II. and IV. but failed to remand the Case for a new Trial. The vacation of the Counts at this late date does not cure the substantial prejudice which guaranteed conviction on Counts I. and III. by refusal to sever prior to Trial.

Petitioner contends that the Sixth Circuit Court of Appeals requires the supervision of this Court in this Case for rendering this Whitesel decision in conflict with the law as stated in Radue, supra, and with Chrane, supra, and for its erroneously affirming the actions of the District Court.

Election prior to Trial was required by Law. The District Court's failure to do so fatally prejudiced the Petitioner as will be shown in the following Argument, entitled, "Illegal Joinder"

C.
ILLEGAL JOINDER

Whether the Petitioner was fatally and erroneously prejudiced by the joinder of Counts I., II., III., IV., and V.

Petitioner Whitesel entered a Pre-Trial motion to quash the Indictment, meeting the requirements of Rule 12(b), F.R.C.P. In this Motion to Quash Indictment by the Grand Jury, the Petitioner said: (R-13)

> That to include Count(s) II., III., IV., and V. with Count I., constitutes a misjoinder of actions, and as such would be extremely oppressive in nature.

The District Judge denied this Motion, stating: (R-14)

> 4. The motion to quash indictment by the Grand Jury on the ground of repugnancy between Count I. and Counts II. thru V. is denied. If there be any need for any electing in this Case, the subject will be

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1/ "Misjoinder of causes of action" means: "The impropriety in joining in one complaint, . . . distinct causes of action which should not be joined because of the want of consistency between them, . . . because they do not arise out of the same transaction, or because of other circumstance precluding joinder under the practice in the particular jurisdiction. 1 AmJ2d Actions §§ 100 et seq. . . ." Ballentine's Law Dictionary.

> dealt with at the proper time.

During the Pre-Trial Hearing, one day before the Trial started, Petitioner, again, brought up the severance of the Counts, stating: (PT-26:12)

> DEFENDANT WHITESEL: . . . shouldn't these Charges be separated?

In answer, the Trial Judge Hogan said: (PT-26:13)

> THE COURT: They will be separated. This Jury will be told to consider each separately, . . .

However, there was no instruction given by the Court to the Jury that Counts II. and IV. were to be treated by them in the alternative to Counts I. and III., although Judge Hogan had assured the Petitioner during the Pre-Trial Hearing that they would be, to wit: (PT-3:3)

> THE COURT: Now, there are four Charges under that Section of the Indictment. They are alternate, however. The Counts with respect to failure to give information, in respect of each of those, two Years are alternate charges, so that even assuming a conviction across the board on those four Charges, the maximum penalty that would be involved in the aggregated of those four Charges would be up to a $20,000 fine or up to two years imprisonment.

Furthermore, when the Jury returned a verdict of "Guilty" on all five Counts, the District Judge sentenced the Petitioner on each Count

separately.

On Appeal, the Sixth Circuit merely brushed aside the District Court's error by vacating the convictions on Counts II. and IV. and failing to consider the fatal prejudice which the Petitioner had suffered by the misjoinder of all five Counts. The Court of Appeals erred by dismissing the matter by "merger" 2/, to wit: (see Appendix "A", Opinion, at 8)

> Appellant also complains that the Counts on which he was convicted are duplicitous and that they are fatally at variance. The two arguments, of course, are contradictory but it does become obvious that Count 1 and 3, and 2 and 4 charge much the same offense and would be established by the same proofs. Doubtless, for that reason the District Judge made the sentences concurrent. Our review of this Record convices us that what was proved was failure to file 3/ and, as a consequence, that the convictions on Counts 2 and 4 pertaining to failure to supply information should be stricken on grounds of merger. 2/
> (underlining added for emphsis)

2/ The doctrine of merger is not applicable in this Case: There was no felony charged.

"Merger of offenses" means: "The common law doctrine that if a misdemeanor is an integral part of the felony and prosecution can only be for the felony. 21AmJ2d Crim. L. §9. . . ."Ballentine's Balentine"s Law Dictionary.

3/ Petitioner's comment: But only with the fatal prejudice of the other Counts hanging over Whitesel to insure conviction. The Jury deliberated for a full day and part of the next morning.

The Sixth Circuit initially erred by making a finding of fact - that "what was proved was failure to file". That was a factual finding to have been made by the Jury but the Trial Court erred by failing - at the very least - to instruct on the "alternate" Charges.

Because of this and what the Petitioner will show this Court later it is Petitioner's contention that certiorari should be granted. The Sixth Circuit has not only rendered this decision in conflict with the decisons in other courts of appeals on the same matter, but it has also so far departed from the accepted and usual course of judicial proceedings as well as sanctioning the departure by the District Court that it calls for an exercise of this Court's power of supervision.

The Petitioner was fatally prejudiced by this misjoinder which the Sixth Circuit totally ignored, contrary to law, to wit:

In Drew v U. S., 331 F2d 85 (CA ___, 1964) the Circuit Court said: (at 88)

> The justification for a liberal rule on joinder of offense appears to be the economy of a single trial. . . .

The Circuit Court in Drew, supra, also stated that: (at 90)

> If, then, under the rules relating to other crimes, the evidence of each of

> the crimes on trial would be admissible in a separate trial for the other, the possibility of "criminal propensity" prejudice would be in no way enlarged by the fact of joinder. When, for example, the two crimes arose out of a continuing transaction or the same set of events, the evidence would be independently admissible in separate trials. . . . In such cases the prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials.

Was there erroneous and fatal prejudice caused by joinder in this Case?

The Drew Court lists what evidence of other crimes are admissible, stating that if they are relevant to: (at 90)

> . . . (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person on trial. ,

then, joinder is permissible - absent prejudice. The Court of Appeals added that "(w)hen the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value".

Petitioner contends that there was no "substantial, legitimate purpose"for joinder (Drew, at 90); that, instead, the Prosecutor's purpose was

to so prejudice and confuse the Jury that it would return a conviction on all five Counts. 4/

The Drew Court sets out the following reasons as argument against joinder: (at 88)

> . . . the Defendant may be prejudiced for one or more of the following reasons: (1) he may be come embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal dispostion on the part of the defendant from which which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not sc find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. . . .

Was the Petitioner prejudiced according to one of these reasons against joinder? - or more than one reason? Let us examine the four major points with respect to joinder in this Case:

Point (1): Was Petitioner "EMBARRASSED (and) CONFOUNDED IN PRESENTING SEPARATE DEFENSES"?

First of all, there was the question of "tax

4/ See preceding Argument, entitled "Election of Counts"which substantiates this contention.

liability" which Petitioner contended was a material issue for Counts V. as well as Counts II. and IV. which the District Court erroneously denied[5/] and the Court of Appeals ignored in its Opinion. The Petitioner argues that "tax liability" was not a material issue on Counts I. and III. (even as to willfulness under the facts and circumstances prevailing).[6/]

Secondly, the Petitioner was faced with the multiplicitous Counts of II. and IV. (which the Court of Appeals vacated). If the Petitioner testified in his defense on Counts I. and III. (failure to make a Return) then, he would have been incriminating himself on the multiplicitous Counts of II. and IV. (failure to supply information on an IRS

5/ During the entire Trial the District Judge failed and refused to permit the Petitioner to cross-examine or defend on"tax liability". For example: When the Petitioner cross-examined the IRS Special Agent (who had recommended prosecution) if he had determined the Petitioner's tax liability, the Agent failed to answer the question;then, the Trial Judge interjected with: (T-187:11)

THE COURT:"His answer is he didn't. He didn't because this Case involves a failure to file or failure to furnish financial information. This is not an evasion case. This case is based on a law which requires people if their gross income exceeds a certain amount, to file a tax return and on a a law which requires people to furnish financial information as required by law. This is not a tax evasion case." The Judge failed to recognize the existance of Count V. !

6/ See the following Argument entitled, "Tax Liability/Counts I. and III." pp.56-57

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1040) since the exercise of his Constitutionally protected rights were not recognized by the Prosecutor, the IRS, or the District Court as acceptable information on Petitioner's IRS 1040 Form.

Thirdly, the Petitioner was faced with the duplicitous Counts I. and III. which charged him with FAILURE TO MAKE a return (at the time prescribed by law) in which one of the factual elements of the offense charged was his failure to supply information, "stating specifically the items of deductions and credits to which he is entitled". If the Petitioner had testified that he was invoking his Constitutionally protected rights on his Tax Returns (Counts I. and III.) and that he was also relying on previous decisions of this Supreme Court in accordance with U.S. v Sullivan, 274 US 259, and U.S. v. Bishop, 412 US 346, respectively, then, he would be incriminating himself and convicting himself for having failed to supply information "stating specifically the items of deductions and credits to which he is entitled". The Trial Court erroneouly failed to take Judicial Notice as to whether the Petitioner had properly invoked his Constitutionally protected rights as to each individual question on the Returns, relying on the Court to make a determination after a hearing in accordance with the Heligman doctrine See Heligman v U.S., 407 F2d 448 (CA 8, 1969)

Lastly, if the Petitioner testified that he did not and could not "anticipate a tax liability"for the Year 1972 (Count V.) and submitted numerical and financial evidence to that effect to convince the Jury, then, the Petitioner would have had to surrender his Constitutionally protected rights which he had originally claimed on his Tax Returns for the Years in question, 1972 and 1973 (Counts

I. and III.), in spite of the fact that the Trial Judge had given him no legitimate or meaningful hearing on this issue in accordance with the Heligman doctrine, supra.

In Cross v. U. S. , 335 F2d 987 (CADC 1964) Chief Judge Bazelon stated in respect to improper joinder of offenses: (at 989)

> Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it impossible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover. a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decided whether this invades his Constitutional right to remain silent, since we think itconstitues prejudice within the meaning of Rule 14.

In Cross, supra, Chief Judge Bazelon had stated the following: (at 989)

> Rule 14 provides:
>
> "If it appears that a defendant * * * is prejudiced by a joinder of offenses * * * for trial together, the court may order an election or separate trials of counts * * * or provide whatever other relief justice requires. "

"Therefore, if because of the * * * (joinder) prejudice developed and was not cured by requiring an election or by other relief, material error afflicted the trial. Prejudice has consistently been held to occur when * * * (joinder) embarrasses or confounds an accused in making his defense. Pointer v United States, 1894, 151 US 396, 403, . . . Kidwell v United States, 1912, 38 App D C. 566, 570. See also, McElroy v United States, 1896, 164 US 76, 78, . . . " Dunaway v United States, . . . 205 Fed 23, 24 (1953). See also Drew v United States, . . . 331 F2d 85.

Point (2): DID THE JURY USE THE EVIDENCE OF ONE OF THE OFFENSES CHARGED TO INFER A CRIMINAL DISPOSITION ON THE PART OF THE PETITIONER FROM WHICH IT FOUND GUILT OF THE OTHER OFFENSES CHARGED?

In the context of time, the Petitioner's alleged offense (Count V.) MAKING A FALSE AND FRAUDULENT STATEMENT on an IRS W-4E ("Exemption from Withholding Certificate" sub-

mitted to his Employer on August 1972) came first in time. Then, Petitioner's alleged offenses of FAILURE TO MAKE a Tax Return (Count I.) and FAILURE TO SUPPLY information on that Return (Count II.) followed some 7 months later (Calendar 1972). Then, Petitioner's second alleged offenses of FAILURE TO MAKE a Tax Return (Count III.) and FAILURE TO SUPPLY information on that Return (Count IV.) for the following (Calendar) Year 1973.

Because the District Judge failed to permit the Petitioner to introduce evidence going to the material issue of "tax liability"[7/] and because the District Judge permitted an "expert" IRS Witness to testify that the Petitioner had a "tax liability" for both Years,[8/] and because the District Judge forbid Whitesel to argue[5/] "tax liability", there was the inevitable and predictable result: The Jury had to conclude that the Petitioner had made a false and fraudulent statement as charged in Count V.[7/] They were forced to do so by the errors of the Trial Judge. Consequently, the Jury was fatally prejudiced into believing that the Petitioner's invocation of his Constitutional protections on the IRS Form 1040 as to the other

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7/ The alleged false and fraudulent statement as charged in Count V. is found on the IRS W-4E Form. It states: "Under penalties of perjury, I certify that I incurred no liability for Federal income tax for 1971 and that I anticipate that I will incur no liability for federal income tax for 1972.

8/ The IRS "Chart Witness"-"Expert" testified: (T-224:2) "They (the computations) represent the tax liability based upon the evidence in this Case."

four Counts (I., II., III. and IV.) was just "cover up". The Jury was forced to believe that the Petitioner was indeed "criminally disposed". The means of forcing the Jury into a prejudiced verdict was illegal and prejudicial joinder.

The statements made by the Prosecutor in his Opening Statement and his line of examination of his Witnesses[9/] would lead the Jury to mistakenly believe that the Petitioner was charged with refusal or failure to pay taxes and that he had plenty of money with which to pay these taxes -and, that the real charge laid against the Petitioner was tax evasion.

For example, look at the testimony of David Izor and of Terrance Wyatt relating to what the Petitioner had told them (presumably going to intent): That testimony and the events it described, on or about November 14, 1973, and within the period of 10 weeks, between June through August of 1973, respectively - was not material or relevant even as to willfulness. Consequently, their testimony was not admissible for Counts I. and II, and Count V. since the events occurred after the fact, and were not legally probative

Predictably, the Prosecutor had everything "going for him" as he deliberately stacked up the damaging testimony and evidence for all five Counts of the Indictment in a confusing and prejudicial package. Predictably for the Petitioner, a tinner by trade (sheetmetal worker), the attempt to defend against the prejudice of five misjoinder major criminal Counts was just too much for any

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9/ All inadmissible.

defendant to handle.

Point (3): THE RESULT WAS THAT THE JURY ACCUMULATED THE EVIDENCE OF THE VARIOUS OFFENSES CHARGED (two of which were later vacated by the Sixth Circuit) AND FOUND THE PETITIONER GUILTY.

If the Charges had been presented separatly and legitimately with the inadmissable evidence and testimony properly prohibited by the Judge, with proper instructions to the Jury on the Law, the Jury could never have returned the verdicts of guilty.

Point (4): WAS THE PETITIONER PREJUDICED AND SEPARATED FROM THE JURY WITH INADMISSABLE AND PREJUDICAL TESTIMONY AS TO WHITESEL'S FAMILY ASSESTS - THAT THE PETITONER HAD $28.000 IN A SAVINGS ACCOUNT?

The Jury had to feel covetous, envious or jealous toward the Petitioner for having such a large sum of money in the Bank. None of them could ever expect to accumulate such a sum in their lifetime, especially with the burden of income taxes to cope with. The Petitioner's absence from the Witness Stand only increased the hostility and prejudice of the Jury. He had no chance to explain the legitimate reasons for the $28,000 family savings, wherein the Lord Jesus had prospered Whitesel's wife and children.

The evidence of each Offense could not possibly be simple or distinct, nor could the District Judge give a proper Jury charge. There was uncontrollable confusion and prejudice building continually throughout the Trial to the fatal prejudice of the Petitioner.

Common Justice, the rules of evidence, Due Process, the Law and the Cases demanded election by the Prosecutor prior to trial on Counts I. and III. (failure to make a Return) or on Counts II. and IV. (failure to supply information), and a separate trial on Count V.

The Law demanded that the Trial Judge sever the Counts since "tax liability" was a material issue for Count V. (and for Counts II. and IV.) and "tax liability" was not a material issue on the others (Counts I. and III.)[6/]

The Law required that the Trial Judge give proper instructions on material evidence as to the various Counts which he failed and refused to do.

Predictably, the joinder of offenses was fatally prejudicial to the Petitioner. Justice demanded the Court of Appeals to vacate the conviction on Counts II. and IV. and also required that the Court of Appeals reverse or remand the Case to the District Court for separate, new trials on the remaining offenses-the one trial on Count V. where "tax liability" was a material issue, and, the other on Counts I. and III where "tax liability" was not a material issue. The Court of Appeals failed and refused to do so. The injustice remaining cannot be tolerated in a free country.

It is the solemn duty of the U.S. Supreme Court to take jurisdiction in this Case, so that Petitioner Whitesel, living in the Sixth Circuit can enjoy the same and equal protection of the

Law (forbidding misjoinder) as citizens of other Judicial Circuits enjoy.

Petitioner so moves

D. [1]

DUPLICITOUS COUNTS I. & III.

Whether Counts I. and III (failure to make a tax return) were duplicitous

Count I. and III of Petitioner's Indictment charged him with a willful and knowing failure to make a return[2] for the Years 1972 and 1973, respectively. (26 USC 7203)

The elements of these offenses of omission were described in the following manner in the Indictment: (R- 1)

1. that Petitioner Whitesel "had and received a gross income" of $22,946.52 (Count I.) and of $21.068.58 (Count III.)

2. "that by reason of such income, he was required by law[3], following the close of the close of the calendar year "1972 (Count I.) and 1973 (Count III.) "to make an income tax return[3] to the District Director of Internal Revenue for the Internal Revenue District of Cincinnati at Cincin-.

1/ "Duplicity" means the joining in single count of two or more separate offenses". U.S v Chrane, 529 F2d 1236, 1237 f. n. (CA5 1976).

2/ The word "knowingly" is not found in the Statute provision (26 USC 7203), thus it is surplusage and fatally prejudicial to the Petitioner.

3/ No law is cited, thus, Petitioner was deprived of knowing the "nature and cause of the accusation" made against him in violation of Amendment Six, U. S. Constitution.

nati, Ohio,[3/] in the Southern Judicial District of Ohio, or to the Director, Internal Revenue Service Center, Central Region, Covington, Kentucky.[3/]

3. "stating specifically the items of his gross income and any deduction and credits to which he was entitled;"[3/]

26 USC 7203 sets out the offense as "failure to make a return at the time prescribed by law".

Petitioner contends, however, that he was charged by the Indictment, (and, the Trial Judge instructed the Jury accordingly) with both FAILURE TO MAKE a return and FAILURE TO SUPPLY information in each and both of Counts I. and III, notwithstanding the multiplicitous charging of FAILURE TO SUPPLY in Counts II and IV.

The Trial Judge's charge to the Jury was as follows: (T-279:19)

> THE COURT: . . . Let's take this Return one first That is Count I. and III. First, that the Defendant was required by law to make a return in the year in question; that is to say, did he have enough gross income to require a return? Second, did he fail to file within the time within the subsequent April, the 15th -- before the subsequent April the 15th? Did he fail to file a Return which constitutes a legal return at the time required by Law? And, third, was that failure, if any, to file such a return willful? Those are the essential elements of the crime in these failure to file offenses.

(at T-282:7)

> THE COURT: Now, as to any possible problem or claim that what was filed on April the 15th, on or about April the 15th in 1973 and 19743; that is to say, what is i is in evidence here as Exhibit 6[4/] and 13[5/] the one being "I protest" written on a return blank[4/] except for the name and so on being the blank return,[5/] mostly blank which contains all the attachments, references to various provisions, whether that constituted a return as required by law, is: The Returns were completely devoid of information concerning his income or deductions or exemptions required. A taxpayer's return which does not contain any information relating to his income, deductions or choice of deductions or exemptions from which a tax can be computed is not a return within the meaning of the law. So, your first and second are failure to file charges -- your first and third Counts.
>
> (underlining added for emphasis)

The Trial Judge, therefore, ruled that the failure to make a return had to be premised upon a Return which did not "contain any information relating to his income, deductions or choice of deductions or exemptions from which a tax can be computed".

In other words, even though the Petitioner

4/ Count I. - Year 1972

5/ Count III. - Year 1973

had invoked his Constitutionally protected rights - rather than give numbers, i. e. supply numerical or financial information - the Judge charged that such was not a Return "within the meaning of the law". Therefore, the Supreme Court must conclude that in these Counts that the Petitioner was actually being simultaneously charged with FAILURE TO MAKE a return at the time prescribed by law and with FAILURE TO SUPPLY INFORMATION on that same Return considered in Count I. and the Return considered in Count III.

Is this conclusion correct? The 5th Circuit Court of Appeals seems to think so. See U.S. v Chrane, 529 F2d 1236 (1976), to wit: (at 1237)

> . . . For each year in question the Internal Revenue Code required the Defendant to file a Return and to supply the information requested thereon if he had a gross income of more than $600. 26 USC §§6012(a)(1), 6011(a) and (e), as amended, 26 USC §§6012(a)(1)(A), 6011(a) and (f), (Supp. III., 1973). . . .
>
> . . .
>
> . . . The government does not claim that Chrane violated any legally-imposed duty to supply information that is broader than the obligation to supply the information called for by the Form 1040's.
>
> . . .

(at 1238) . . . The Statutory scheme contemplates that the form for a Return will be filed with appropriate information noted thereon. If the form is filed in blank it is not a Return. Radue, supra, The failure

> which causes a filed but blank form not to be be a return is the omission of information therefrom. . . .
>
> (underlining added for emphasis)

As we can see, the Fifth Circuit in Chrane's case, supra, has ruled that when one invokes his Constitutionally protected rights upon his Return in accordance with this Court's decisions in U.S v Sullivan, 274 US 259, and U.S. v Garner, 44 LW 4323, it has often been ruled a "blank" Form 1040 because of "the omission of information therefrom". In other words, the FAILURE TO SUPPLY information upon the Form 1040 Return (an offense under 26 USC 7203) makes one, simultaneously guilty of FAILURE TO MAKE a Return at the time prescribed by Law (also an offense under 26 USC 7203).

Petitioner contends that the Sixth Circuit erred in its Opinion when it judicially coupled two Internal Revenue Statute Provisions (§6012 and § 6011) without authority in order to affirm Whitesel's conviction as to Counts I. and III.

26 USC 6012(a) states that a person making a gross income over a certain amount is required to make a return, to wit:

> (a) General Rule. Returns with respect to income taxes under subtitle A shall be made by the following:
>
> For the Year 1972:
>
> (1)(A) Every individual having for the taxable year a gross income of $600 or more, . . .

For the Year 1973:

> (1)(A) Every individual having for the taxable year a gross income of $750 or more, . . .

In the Code of Federal Regulations pertinent to this Section 6012, the following statement is found: 26 CFR 1. 6012(a)(6)

> (6) Form of Return. Form 1040 is prescribed for general use in making the return required under this paragraph. . . .

In other words, the only requirement set out by Statute or by IRS Regulation is that an individual is required to make a return upon an IRS Form 1040. No provision of this Regulation section requires the supplying of information upon that IRS Form 1040.

The language of 26 USC 6011 requires information only from those who are liable for a tax,[6/] to wit:

> (a) General rule. Every person subject to any tax, . . . under subtitle A

6/ The Fifth Circuit was in error in the Chrane decision, supra, when it stated that subsection(f) of 6011 was applicable, however, it only refers one to 6012. It upholds instead, Petitioner's contention that a return must be filed under 6012 "whether or not there is tax liability", to wit:

"(f) For requirement that returns of income, . . . be made whether or not there is tax liability, see sections 6012 . . .

> of the Code shall make such returns . . . as are required by the regulations in this chapter. The return . . . shall include therein the information required by the applicable regulations or forms.
>
> (underlining added for emphasis)

When is an individual liable for a tax?(or subject to a tax?) The answer is either when he assesses himself an income tax by filling in a 1040 Form[7/] or when the judgment of an Article III. Court if final determining that the person is liable for a tax. (See 26 USC 7422 or 6213, 7441, and 7482, see also 7481)

It necessarily follows that if one does not choose to assess himself a tax upon a Form 1040 (by invoking his Constitutionally protected rights a la Chrane and Whitesel, the Petitioner here)then he cannot be liable for a tax until the tax is lawfully determined by a "final assessment" in a Court of Law. Therefore, Section 6011 and its provisions cannot apply to the Petitioner because there is no tax liability lawfully assessed against him. Judicially speaking, the Petitioner is not liable for any tax unless the Courts are making ex parte findings without the consent of the tax payers.

Let us assume arguendo, that the Government Establishment was attempting to apply 26 USC 6001 without letting the Petitioner in on the secret. Maybe it could apply to those persons who had not invoked their Constitutionally protected

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7/ which establishes the amount of the"voluntary" self-assessed tax to become official when it is recorded by the IRS. See 26 USC 6201, 6203.

rights upon their Return in accordance with Sullivan, supra, and Garner, supra - but, does it apply to the Petitioner Whitesel?

Section 6001 demands the supplying of information upon a Return if Notice is given to do so, to wit:

> . . . Whenever in the judgment of Secretary or his delgate it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, . . . as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

When the District Director served such "Notice" (Govt. Exs. 9 & 10) on Whitesel, the Petitioner responded to the IRS District Director as follows: (Govt. Ex. 11)

> Dear Sir:
>
> Since receiving your letter stating that my Tax Return was not acceptable, I have read and studied the Constitution of the United States of America, which I'm sure you will agree is the foundation of all the laws of the United States of America. In so doing I find that it is impossible to fill out a 1040 Form without giving up my Constitutional rights.
>
> If I may direct your attention to the following sections of the Constitution of the United States of America: Article I, Section 9; Article I., Section 10; Article III , Section 2; Article IV., Section 2; Article IV., Section 4; Article VI., Section 1; Amendments I., IV., V., VI., IX., X., XI., XII , and XIII.
>
> I would like to comply to Internal Revenue Service's Rules if you could show me how to do so without giving up the aforementioned Constitutional sections.
>
> If I don't receive a reply to this letter within ten days I will assume that you can't advise me how to fill out your 1040, without giving up my Constitutional rights and that I don't have any tax liability for any of the tax years in question or for any furture years.
>
> Constitutionally yours,
> s/ Roger L. Whitesel
> (notarized)

The District Director failed and refused to offer the Petitioner any assistance with the preparation of his Tax Return in clear violation of the Congressional mandate of "Taxpayer Assistance" for which great sums of money are annually appropriated.

The District Director "assisted" Whitesel by attacking him like some sort of criminal - first by inquisition, then, by Indictment!

The Indictment in Counts I. and III. charged the Petitioner with failure to make a Return"stating specifically the items of his gross income and any deductions and credits to which he was entitled" 8/

8/ A search of old Tax Laws shows that this phrase was limited to corporations, and, consequently it is not only not lawful for use on an Indictment against an individual but such use must be fatally prejudicial - as it was to Petitioner.

that is, with failure to supply information - both separate offenses under 26 USC 7203.

The Trial Court charged the Jury for Counts I. and III. that: (T-282:17)

> . . . A . . . Return which does not contain any information relating to his income, deductions or choice of deductions or exemptions from which a tax can be computed is not a return within the meaning of the law. . . .

Again, the Trial Judge was charging the Jury that the Petitioner had not only FAILED TO MAKE a return but had also FAILED TO SUPPLY information. And, in view of the Fifth Circuit's decision settling the law on this subject rationally (Chrane, supra,), the Supreme Court should rule that "(t)he failure which causes a filed but blank Form not to be a return is the omission of information therefrom". This determination would admit that the offense is both one of failure to make a return and failure to supply information, both separate offenses under 26 USC 7203 and the joinder must be Judicially Noticed.

The Petitioner argued this matter on appeal. Naturally, the Court of Appeals ignored the challenge - failing and refusing to make a ruling in this matter. Consequently, it is necessary for this Court to supervise the Sixth Circuit in this matter since, by its silence, the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

Petitioner so moves.

E

TAX LIABILITY / COUNTS I. & III.

Whether "tax liability" was material to the offense charged in Counts I. and III.

Petitoner has already presented to this Court the question of whether Count I. and III. are duplicitous in which the Chrane case, supra, was cited as controlling in the Court of Appeals for the Fifth Circuit.

In the Chrane case, the 5th Circuit ruled that both Sections 6012 and 6011 are involved in an offense of failure to make a return at the time prescribed by law (26 USC 7203) in which the Court of Appeals stated: (at 1238)

> . . . The Statutory scheme contemplates that the form for a Return will be filed with appropriate information noted thereon. If the Form is filed in blank it is not a Return. Radue, supra. The failure which causes a filed but blank form not to be a return is the omission of information therefrom. . . .
>
> (underlining added for emphasis)

and (at 1237)

> . . . For each year in question the Internal Revenue Code required the Defendant to file a Return and to supply the information requested thereon if he had a gross income of more than $600. 26 U. S. C. §§ 6012(a)(1), 6011(a) and (e), as amended. . . .

Petitioner has shown this Court that 26 USC 6011 requires information only from one who is "subject to any tax". Consequently, if the Chrane Court is correct in its finding that Sections 6012 and 6011 must be read together, then Petitioner contends that "tax liability" was material to the charges of Counts I. and III. Therefore,

The Trial Court erred to the fatal prejudice of the Petitioner in his failing and refusing to permit evidence going to "tax liability" to be entered into the Trial by the Petitioner. Likewise, the Sixth Circuit Court of Appeals erred by remaining silent on this matter and affirming the convictions on Counts I. and III. Justice would have required either a reversal on these Counts or remand to the District Court for a new trial where "tax liability" would have been a material fact for the Jury to determine.

By the silence of the Sixth Circuit, that Court has decided an important question of Federal law which has not been, but should be, settled by this Court, thus, requiring the exercise of this Court's power of supervision.

Petitioner so moves.

F

TAX LIABILITY / COUNT V.

Whether "tax liability" was material to the offense charged in Count V. ("false" W-4E)

In Count V. of the Indictment, Petitioner was charged with making a false and fraudulent statement upon an IRS Form W-4E, "Exemption from Withholding Certificate" on which he claimed that he incurred no liability for Federal income tax for the Year 1971 and that he anticipated he would incur no liability for Federal Income Tax for the Year 1972. (26 USC 7205)

Is "tax liability" a material issue? Petitioner contends that it is: - that he was charged with telling a lie regarding his "tax liability"for the Years 1971 and 1972. That is what the Indictment says.

Petitioner was strictly forbidden to introduce any evidence going to "tax liability" by the Trial Judge - claiming that "tax liability" was not material.[1/] The Jury was not instructed about "tax liability", in spite of the fact that the Prosecution kept shouting "tax liability" to Petitioner's prejudice throughout the Trial.[2/]

After the Petitioner argued this issue in his BRIEF OF APPELLANT the Court of Appeals refused to acknowledge or recognize the issue of

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1/ See for example, footnote 5/, p 37

2/ See for example, footnote 8/, p. 41

"tax liability" as it applied to Count V. in its Opinion. Instead, it affirmed the conviction on Count V.

The question of tax liability is a vital issue which the Supreme Court has not considered, and should be settled as to the facts and circumstances of this Case. The Court of Appeals, by its silence sanctioned the District Court's totally illegal departure from the accepted and usual course of judicial proceedings by affirming the Conviction on Count V. where the only material issue of the charge was forbiddent to be entertained by the Petitioner, ie "tax liability". Such actions requires the exercise of this Court's power of supervision.

The Petitioner so moves.

G.
FAIR TRIAL & TAX LIABILITY

Whether a determination of Petitioner's "tax liability" was necessary - if any there was, - to assure a fair trial.

It is the Government's policy to prosecute a person criminally before civil action is initiated in Tax Cases. See U. S v. Brodson, 155 FSupp 407 (Dist. Ct. E. D. Wisconsin).

In Brodson, however, the District Court ruled that a fair trial was more important than Government policy, to wit: (at 408)

> This Court cannot pass upon the desirability of that Government policy. It is the duty of this court to see that the Defendant has a fair trial. Where the enforcement of the Government Policy would deprive the Defendant of a fair trial, it is the duty of the Court to give precedence to the right of the Defendant to have a fair trial over and above the Government policy.
> . . .

Although Petitioner's case is distinguished from that of Brodson's, a just court would have decided for the fair trial over Government policy.

In Brodson, supra, "fairness" revolved around the releasing of assets seized by the IRS so that Brodson could "use them in the preparation and defense" of his tax criminal case. The use of these assets was "in the preparation and defense of this case". This is what the District Court determined whould make for a fair trial -

the settlement of the civil liability before proceeding with the criminal trial.

Here, in Petitioner's case, "fairness" revolved around a more substantial issue, to wit: Was there a tax liability? This was a material and substantial issue for all five Counts of the Indictment. As a consequence, there could be no just determination of the innocence or guilt of the Petitioner on the Charges until the question of whether Petitioner did or did not have a tax liability had been settled in accordance with law instead of the unlawfully given opinion given by the IRS "chart-witness"-"expert".

Is the Government Policy to proceed with prosecution on criminal charges before civil action is pursued lawful?

The Sixteenth Amendment says, "No". The power is given to "lay and collect taxes on incomes".

The Case law holds that the proper purpose of the Tax Laws is to raise legitimate revenue - not to foster criminal prosecutions.

Whereas Petitioner suffered criminal prosecution when there had never been a civil determination - in accordance with law - whether or not he had a tax liability, other American citizens are afforded Due Process by the IRS not recommending criminal prosecution but rather proceeding against the individuals with the filing of a Statutory Notice of Deficiency (26 USC 6212) resulting in a civil determination - via the Tax Court - as to whether or not there was a tax liability.

Two recent Tax Court Petitioners,

almost identical with Petitioner in the manner in which they made their Tax Returns - They are Edward A. Cupp (see 65 T. C. 6) and Raymond M. Hartman, 65 T. C. ___, filed December 15, 1975).

Both Cupp and Hartman invoked the protections afforded them by the Bill of Rights upon their IRS Form 1040; both of them relied on previous decisions of this Court for making their returns in the manner in which they did, both of them believed that they had not earned Dollars, yet neither of them have been prosecuted before the IRS had determined their lawful tax liability.

Why was Whitesel, the Petitioner, here, treated differently than were Cupp and Hartman?

Why was the Government Policy to prosecute first followed with the Petitioner and not followed with Cupp and Hartman?

Why was Brodson allowed to proceed with his civil action, whereas, the IRS failed and refused to initiate civil action with the Petitioner?

Why was Brodson granted a "fair trial", whereas Whitesel was deprived of everything guaranteed by the U. S. Constitution including an impartial Jury?

The answers are not available to this writer. However the facts in this case are: The Sixth Circuit Court of Appeals departed so far from the accepted and usual course of judicial proceedings when it failed and refused to recognize in its Opinion the error committed by the Trial Court on the issue of "tax liability" and affirmed the convictions on Counts I., III. and V. instead of reversing them

or remanding them to the District Court for new trials, after "tax liability" had been or not been established in accordance with the law.

The failure to so act requires this Court to exercise its power of supervision in order that the Petitioner may have a "fair trial" as did Brodson, supra.

The Petitioner so moves.

H.

WILLFULNESS / COUNT V.

Whether the Instructions to the Jury were in conformance with the Garner Decision and the Bishop Decision.

The Petitioner was charged in Count V. with making a false and fraudulent statement upon an IRS Form W-4E, Exemption from Withholding Certificate". (26 USC 7205)

The alleged false and fraudulent statement is as follows: (Govt. Ex. 14)

> Under penalties of perjury, I certify that I incurred no liability for Federal income tax for 1971 and that I anticipate that I will incur no liability for Federal income tax for 1972.

The facts in the Case show that the Petitioner had a tax refund of $41.19 for the Year 1971 and that the Petitioner had $2,185.90 withheld in taxes for the Year 1972 up to the time on August 4, 1972. when he submitted the W-4E form to his employer.

The Internal Revenue Law, 26 USC 3402(a) describes the funds withheld from wages by an employer as "income tax". See Tables 1, et seq

It would have been Petitioner's defense if he had been permitted to take the Witness Stand in his own defense, that he believed that by his receiving a tax refund of $41.19 for the Year 1971 that he had not "incur(red)" a "liability for Federal income tax for 1971" and because of his hav-

ing had $2,185.20 withheld in income tax for the Year 1972 that such amount would be sufficient for any taxes due for that Year - thus, he did not "anticipate that (he would) incur (a) liability for Federal income tax for 1972, since it had already been paid.

The facts show that at the time he submitted this W-4E Form to his employer he also submitted a paper entitled, "Notice to Stop Withholding" to his employer (see Govt. Ex 15). In this "Notice" the Petitioner invoked his Fourth and Fifth Amendment protections, and concluded by stating:

> 13) I hereby agree to pay my equitable share of taxes only for constitutional expenses of a patriotic government which obeys The United States Constitution. I am NOT refusing to pay a lawful tax, lawfully imposed, when I am paid in lawful money and and/or legal tender which is U.S. Notes, and/or gold and silver coins.

There was no attempt by the IRS to notify the Petitioner that his W-4E form was not entirely satisfactory, even though the IRS was immediately notified of Petitioner's actions by the Employer.

It wasn't until the U.S. Attorney filed a Bill of Information against the Petitioner on April 12, 1974, that the Petitioner was notified of the IRS's objection to his W-4E Form. The charge was the same as that found, here, in Count V.[17]

1/ See footnote 3/, p 27

The Petitioner contends that the District Judge's instructions to the Jury were erroneous and fatally prejudicial to him;- The Judge failed entirely to define "tax liability" and the instruction on willfulness failed to follow the criteria as set out in U.S. v Bishop, 412 US 346 (1973), to wit: (T-286-18)

> THE COURT: Now, willfully here has a slightly different meaning. Willfully means simply that the Defendant knew the requirement of telling the truth and intentionally and with a bad purpose didn't tell the truth, told a falsehood, if that be the case.
>
> The good faith does not come into this fifth Charge in this sense. There is no such thing as knowingly and intentionally and willfully making a false statement knowing it to be false intending for somebody to rely on it and act in a certain way, there is no such thing as doing that and being in good faith about it. If a person knows what he is saying is false, and it is not correct in fact, and says it intending for another person to act on it, all the good faith in the world can't make what is false in fact true. So, in that sense good faith is not included in willfulness in respect of that requirement of the fifth Charge.

Under the facts of the Case, where there was evidence offered by testimony showing his good faith intentions and by exhibits showing his invocation of his Constitutional protections and his reliance on law - whether they were valid or erroneous, then, good faith should have been part of the Judge's instruction.

Athough Garner v U. S., 44 Lw 4323(1973) was in reference to a 26 USC 7203 offense, Petitioner contends that the doctrine set out there, should be equally applicable to this 7205 offense of Count V.

This Court said that: (at 4328)

> . . . The Fifth Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege, a protection broadened by § 7203's statutory standard of "wilfulness".

In the accompanying footnote to this statement, this Court said: (f. n. 18)

> Because § 7203 proscribes "willful" failure to make returns, a taxpayer is not at peril for every erroneous claim of privilege. The Government recgonizes that a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith. . . .

Petitioner had in good faith made out the W-4E Form. Petitioner had in good faith submitted his "Notice" to his employer at the same time setting out his understanding of the law and invoking his Fourth and Fifth Amendment protections in a timely fashion.

It was up to the Jury whether they wanted to believe what he had done was or was not done in good faith, however erroneous and invalid it may have been (or not been). However, the Judge "shut the door" in their face. The instructions

prohibited them from making any determination on Count V. since "tax liability" was never defined and the Judge had already, in substance, made the factual determination that "good faith does not come into this . . . Charge".

On appeal, the Sixth Circuit held that there was "no error prejudicial to Appellant's rights" by the Judge's instructions to the Jury. (at 10)

In Petitoner's Motion for Rehearing, Petitioner argued using the Garner case, supra, for the first time.

In the Order denying this Motion the Sixth Circuit stated that such Motion was denied since "no argument which had not been previously considered by the Panel which decided the Appeal"

The Court of Appeals erred in its Opinion when it upheld the Instructions of the Judge; and the Court erred also when it failed to take notice of the Garner case on Rehearing.

As a consequence of the Sixth Circuit's sanctioning the errors of the Trial Judge in his Instructions, and as a consequence of the Sixth Circuit's ignoring this Court's decision in the Garner and Bishop cases, these errors call for the exercise of this Court's power of supervision.

Petitioner so moves.

I.

WILLFULNESS / COUNTS I. & III.

Whether the Instructions to the Jury were in conformance with the Garner Decision and the Bishop Decision

The Petitioner was charged in Counts I. and III. with failure to make a tax return. (26 USC 7203)

Petitioner timely filed his IRS Form 1040 Individual Income Tax Return for the Year 1972 and invoked his Constitutional rights, saying: (Govt Ex. 6)

> Under protest, I plead the Fourth and Fifth Amendment to the United States Constitution.

No financial information was given upon the Return by the Petitioner, and he took exception to each individual question thereon.

Petitioner timely filed his Income Tax Return[1/] for the Year 1973 wherein he took exception to each individual question. Attached to this Return was a Petition of 111 pages for redress of grievances in which the Petitioner showed: that he was relying on previous Decisions of this Supreme Court; that he was invoking his Constitutional rights for his own protection; and that he believed on the basis of his reading and knowledge of the laws as they pertained to the American money and tax system that some were Consti-

1/ on which he printed: "Object, see attachments".

tutional while others were not. He asked in the Prayer that he be given both an administrative and judicial determination on his Fifth Amendment objections where he would "be given the benefit of his full Constitutional rights".

On April 9, 1974, the IRS mailed the Petitioner a Notice/Letter in which Petitioner was advised that his Return was not acceptable since a return which had no figures upon it from which a tax could be computed was not a return "within the meaning of the law" and also advising him to submit a new return, otherwise, he could be prosecuted under 26 USC 7203. This was for the Return for 1972.

The following July 29, 1974, the Petitioner received the identical Notice/Letter for the Return for 1973.

Three days after the first Notice/Letter was sent, the U. S. Attorney, by Information, charged the Petitioner with making a false and fraudulent statement on a W-4E Form - later that Year the Charge was dropped (and reinstituted by Grand Jury Indictment as Count V. of this Case).

A month after the second Notice/Letter was sent to Petitioner, in August 1974, the IRS started investigation of the Petitioner although the Chief of the IRS Intelligence Staff, Central Region, testified that no investigations were initiated for 45 days of mailing such Notice/Letter.

On September 20, 1974, the Petitioner answered this Notice/Letter stating in part that: (Govt Ex. 11)

> . . . I find that it is impossible to fill out a 1040 Form without giving up my Constitutional rights.
>
> . . .
>
> I would like to comply to Internal Revenue Service's Rules if you could show me how to do so without giving up the aforementioned Constitutional sections.
>
> . . .

Instead of an answer from the IRS, the Petitioner was Indicted on October 7, 1974.

During the course of the Trial proceedings, there was testimony entered substantiating Petitioners reliance on his Constitutional protections and his belief that the only Dollars which were lawful and Constitutional were gold and silver coins and U. S. Notes. Other testimony (which Petitioner contends was inadmissible and so argued on appeal) would place the Petitioner's motive elsewhere.

All the Exhibits entered, again, showed his reliance on his Constitutional protections and his reliance on Supreme Court decisions and on the Law as he understood it regarding taxes and money.

The Petitioner contends that the Instructions given by the Court to the Jury were fatally prejudicial - absolutely closing the door to any determination by the Jury as to willfulness wherein his good faith assertion of his rights and his reliance on Supreme Court decisions and on the Law. whether they right or erroneous.

The Trial Court instructed the Jury that: (T-282:17)

> A taxpayer's return which does not contain any information relating to his income, deduction or choice of deductions or exemptions from which a tax can be computed is not a return within the meaning of the law. . . .

Petitioner had relied for his Return for Year 1973 upon this Court's decision in U. S. v Sullivan, 274 US 259 in which this Court said that if the return called:

> . . . for answers that the Defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all.

Sullivan, supra, was further negated by the Judge when he had previously instructed the Jury as follows: (T-281:15)

> Now, this Court states to you as a matter of law that there was and is no basis in either fact or law for the reasons assigned by the Defendant in Exhibit 13 and referred to in the arguments in this Case. The question of Constitutionality of the Federal income tax system insofar as this Case is concerned, as well as the question of Constitutionality of the Federal Reserve System of the United States under which every currency bill any of us have in our pockets was issued, as well as the Constitutionality generally of the income tax system, vis-a-vis or as opposed to either or both the Fifth or Fourth Amendments of the Constitution or any other parts of the Constitution of the United States, those questions have repe-

> tively through many years been questioned before the Supreme Court of the United States insofar as the questions in this case are involved or as applied to the facts of this Case; and those laws have been uniformly upheld.

These instructions further negated the previous instruction on willfulness when the Trial Judge stated (above) that "there was and is no basis in either fact or law for the reasons assigned by the Defendant". This statement made "good faith misunderstanding of the requirements of the law" and the Petitioner's "reasons" for "his refusal, if any, to file an income tax return in the manner required by law" "were in good faith and based on his actual belief" meaningless. (see T-280:5-281:14)

The form of an instruction on willfulness was there, but the substance had been yanked out by the Judge who not only instructed the Jury on the Law, but in so doing - in error - he made the determination of the factual issues for the Jury. In truth the Jury was only the "mouth-piece" for the Judge!

In Garner v U.S., supra, this Court said that a Defendant deprived of a hearing on whether he had invoked his privilege rightly would not be prejudiced since he would be insulated by the standard of "willfulness", to wit: (at 4328)

> . . . The Fifth Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege, a protection broadened by §7203's statutory standard of wilfulness".

and(at f. n. 18)

> Because § 7203 proscribes "willful" failure to make returns, a taxpayer is not at peril for every erroneous claim of privilege. The Government recognizes that a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith. . . .

But, Whitesel, the Petitioner was convicted because the Trial Judge set the instructions to do just that.

Where was the instruction from U.S. v. Bishop, 412 US 346(1973) wherein the Supreme Court said that if one were relying on previous decisions of the Supreme Court that willfulness could not be proven? There was none.

The Petitioner was denied an impartial Jury and was fatally prejudiced by the error of the Judge's instructions to the Jury. He was denied Due Process of Law.

On appeal the Sixth Circuit affirmed the convictions stating that they could"find no error prejudicial to Appellant's rights" by the Judge's instructions. (at 10)

On Rehearing the Court of Appeals noted that it was denied because "no argument which had not been previously considered by the Panel which decided the appeal" (Appendix "B")

Petitioner had set out the doctrine set by Garner, supra, and as argued above, as a new argument (with others) on Rehearing, therefore the Court of Appeals erred for the second time.

As a consequence of the Sixth Circuit's sanctioning the error of the Trial Judge in his Instructions, and as a consequence of the Sixth Circuit's ignoring this Court's decision in the Garner and Bishop cases, these errors call for the exercise of this Court's power of supervision.

Petitioner so moves.

VIII
CONCLUSION

Petitoner has invoked the provisions of Rule 19, Rules of the Supreme Court, to guarantee his enjoyment of rights protected by the Constitution.

This Petition has shown that in Roger L. Whitesel's case, the Sixth Circuit Court of Appeals:

1. Has rendered a decision on joinder and election in conflict with the Fifth Circuit.

2. Has decided the issue of counsel as an important question of Federal Law which has not been, but should be settled by this Court.

3. Has decided the issue of willfulness in conflict with Decisions of this Court, and

4. Has so far departed from elementary standards of Due Process and a fair trial by affirming Conviction on two mutally exclusive Counts of the Indictment, the proof of which is utterly impossible in simultaneous trial under prevailing and accepted rules of evidence.

The Trial Court excluded evidence proferred by the Petitioner as to "tax liability" and accepted immaterial evidence by the Prosecutor

as to "tax liability".

American Justice cannot tolerate one rule of law to govern the Prosecuion and a different rule of law to govern the defense. That kind of "Justice" was meted out by the Sixth Circuit Court of Appeals in the Whitesel Case, here.

The U. S. Supreme Court must issue its writ of certiorari and accept the Case of Roger L Whitesel for plenary trial reviewing the error in the Court(s) below - the effect of which has been to deprive the Petitioner Whitesel of his Liberty freely granted to him by his Saviour, Jesus Christ, the Living God of Israel, won by bloodshed of his Christian Forefathers in the American Revolution and secured by the Declaration of Independence as well as the U. S. Constitution and the Bill of Rights.

Simple Justice demands issuance of the writ.

IX
PRAYER

WHEREFORE, Petitioner Whitesel prays that the U. S. Supreme Court will issue its writ of certiorari to the U. S. Court of Appeals for the Sixth Circuit.

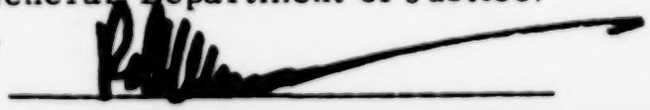
ROGER L. WHITESEL
Petitioner pro se

2709 Fleming Road
Middletown, Ohio

April 7, 1977

Certificate of Service:

I certify that I have this 8th day of April, 1977, mailed - hand delivered 3 copies of this Petition to the Solicitor General, Department of Justice. Washington, D. C.



Appendix "A"

No. 75-1648

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROGER L. WHITESEL,
Defendant-Appellant.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed October 22, 1976.

Before: EDWARDS, McCREE and LIVELY, Circuit Judges.

EDWARDS, Circuit Judge. Appellant Whitesel appeared before this court pro se to argue his appeal from conviction for failure to file income tax returns for the years 1972 and 1973, in violation of 26 U.S.C. § 7203 (1970), and for failure to supply information to the Internal Revenue Service for the same years, in violation of 26 U.S.C. § 7203 (1970), and for supplying false and fraudulent information about withholding exemptions to his employer, in violation of 26 U.S.C. § 7205 (1970). The case was tried to a jury before a District Judge in the United States District Court for the Southern District of Ohio and defendant was found guilty on all counts.

Appellant was sentenced to a total of two years imprisonment and a total fine $1,500. The sentences by count were as follows :

Count 5: One year and $500 fine.

Count 1: Six months and $500 fine. Both consecutive to Count 5.

Count 2: Six months – consecutive to Count 5 and concurrent with Count 1 – and a fine of $500 remitted.

Count 3: Six months – consecutive to Counts 1 and 5 – and a fine of $500 in addition to Counts 1 and 5.

Count 4. Six months – concurrent with Count 3 and consecutive to Counts 1 and 5 – and a fine of $500 remitted.

The facts proved before the District Court established that in 1972 Whitesel filed an IRS 1040 Individual Tax Return containing on page 1 of the return: "Under protest. I plead the Fourth and Fifth Amendments and the United States Constitution." In 1973 no financial information was provided, but on the form defendant printed: "Object, see attachments," and submitted 170 pages of protest material concerning the income tax system. Defendant's wife filed separate returns.

On August 4, 1972, defendant filed with his employer, Valley Sheet Metal Works, Inc., an exemption from withholding Form W-4(e) in which he stated that he had incurred no liability for a federal income tax for 1971 and anticipated incurring no income tax liability for 1972. Thereupon the employer stopped withholding sums from defendant's pay check but also consulted the Internal Revenue Service about the matter which led to this prosecution.

The government also introduced W-2 forms showing defendant's gross wages for 1971 to have been $16,634.56; for 1972, $19,403.42; and for 1973, $19,868.58. An IRS accountant testified that assuming these gross wages, defendant should have paid a tax of around $4,500 for 1972 and something over $5,000 for 1973, these figures apparently being based on standard deductions. Actually, in 1971 the government record shows that $3,357.40 was withheld for that year, and after filing a return, the defendant received a refund of $41.19.

The issues in this taxpayer protest suit represent an attack on the present tax system of the United States, its monetary system, and its system of justice.

First, and of principal concern to this court, appellant contends that he has been deprived of his Constitutional right to chosen counsel by the District Judge's refusal to allow him to be represented at his trial by an accountant, not a lawyer or a member of the bar, named George W. Thiel. The District Judge did, however, inform appellant that if he didn't have the funds, counsel would be appointed for him and that under the recent decision of the United States Supreme Court in *Faretta* v. *California*, 422 U.S. 806 (1975), he had the right to represent himself and if he chose to do so, he could have Mr. Thiel at the counsel table with him advising him, but Mr. Thiel would not be allowed to participate in the trial. It is appellant's contention, however, that the Sixth Amendment right to "counsel" did not in 1789, and does not now, pertain to members of the bar, but should be construed as allowing for the advice and participation of a friend of the accused who is not a lawyer. This argument has decisively been rejected by three of the Courts of Appeals which have considered the issue.

The Fifth Circuit dealt with his issue in *United States* v. *Cooper*, 493 F.2d, 473 (5th Cir.), *cert. denied*, 410 U.S. 859 (1974), where the court stated:

> There is no colorable merit in the proposition that a criminal defendant (especially one who has twice rejected the services of qualified and competent court-appointed counsel) is constitutionally vested with the right of assistance or representation by a lay person.
> *United States* v. *Cooper*, *supra* at 474.

The same result was reached by the D. C. Circuit in even stronger language in *Harrison* v. *United States*, 387 F.2d 203 (D.C. Cir. 1967), *rev'd on other grounds*, 392 U.S. 219 (1967):

> The Sixth Amendment pledges that "[i]n all criminal prosecutions, the accused shall enjoy the right • • • to have the Assistance of Counsel for his defence." This adjuration necessitates the guiding hand of counsel at every step in the proceedings against him," including "the giving of effective aid in the preparation and trial of the case." It is clear that these demands are not satisfied when the accused is "represented" by a layman masquerading as a qualified attorney; it is unthinkable that so precious a right, or so grave a responsibility, can be entrusted to one who has not been admitted to the practice of the law, no matter how intelligent or well educated he may be. This is particularly so where, as here, the accused is on trial for an offense upon conviction of which his very life could become forfeit.
> *Harrison* v. *United States*, *supra* at 212.

Similar results were reached in *United States* v. *Jordan*, 508 F.2d 750 (7th Cir.), *cert. denied*, 423 U.S. 842 (1975), and *McKinzie* v. *Ellis*, 287 F.2d 549 (5th Cir. 1961). *See also Turner* v. *American Bar Ass'n*, 407 F. Supp. 451, 477-78 (W.D. Wis. 1975).

Nonetheless, the question posed by this appeal remains open for our consideration, since it has never been passed upon either by this court or by the United States Supreme Court. In fact, as appellant points out, in the Supreme Court's most recent construction of the Sixth Amendment, wherein it upheld a criminal defendant's right to self-representation, it employed language which suggests that there may well be a distinction between the term "counsel" as used in the Sixth Amendment and the term "attorney-at-law."

> The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, "the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." This prejudice gained

> strength in the Colonies where "distrust of lawyers became an institution." Several Colonies prohibited pleading for hire in the 17th century. The prejudice persisted into the 18th century as "the lower classes came to identify lawyers with the upper class." The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class." In the heat of these sentiments the Constitution was forged. *Faretta* v. *California*, 422 U.S. 806, 826-27 (1975). (Footnotes omitted.)

We do not read these words (as appellant would have us do) as determining that any defendant can choose any person he wishes, regardless of qualification, to be his counsel in the trial of a criminal case. But they do suggest our careful examination of the issue.

The Sixth Amendment provides in part that in all criminal prosecutions "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Critical to any interpretation of this language is Section 35 of the Judiciary Act of 1789 (1 Stat. 73) which was adopted by Congress almost contemporaneously with its proposal of the Sixth Amendment.[1]

> SEC. 35. *And be it further enacted*, That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.
>
> Judiciary Act of 1789 (Ch. 20, § 35, 1 Stat. 92 (Now codified as 28 U.S.C. § 1654 (1970)).

This statute has recently been cited and relied on by the United States Supreme Court in upholding the Sixth Amend-

[1] President Washington signed the Judiciary Act of 1789 one day before Congress proposed the Bill of Rights to the states.

ment right of an accused to elect to defend himself. *Faretta* v. *California*, *supra*. No suggestion of conflict between the meaning of the Sixth Amendment and Section 35 is advanced in the briefing of this appeal, nor has our research developed any. Assuming, as we do, that the Sixth Amendment was adopted to make constitutionally secure in criminal cases rights already existing in the recently adopted statute, two applicable principles emerge from construction of the "assistance of counsel" guaranteed by the Sixth Amendment. First, since in the statute the terms "counsel or attorneys at law" are employed alternatively, it seems probable that the proposers of the Sixth Amendment did not mean to limit representation exclusively to "attorneys at law." Second, the statute clearly provides for the rules of the courts of the United States to determine who shall "be permitted to manage and conduct causes therein." By this language Congress recognized the constitutional power given the federal judiciary by the then recently adopted Constitution, Article III.

Interestingly enough, the rules of the United States District Court which tried this case provide as follows:

> 2.4.1 Roll of Attorneys
>
> The bar of this court shall consist of those attorneys heretofore and those hereafter admitted to practice in this court.
>
> 2.4.2 Eligibility
>
> Any member in good standing of the bar of the Supreme Court of Ohio who resides in or maintains an office for the practice of law in this district, is eligible for admission to the bar of this court.
>
> 2.4.3 Application for Admission
>
> All candidates for admission to the bar of this court shall file with the clerk, at least twenty(20) days prior to the examination, an application on the form provided by the Clerk. Said application shall contain a certificate of two (2) members of the

bar of this court, vouching for the good moral character and professional reputation of the applicant. Each candidate shall present himself for examination at the next examination after the filing of his application. If he fails to do so, it will be necessary for him to file a new application

2.4.4 Examination for Admission

Unless otherwise ordered by a judge of this court, no applicant shall be admitted except upon successful completion of a written examination.

Under the direction of the chief judge, or his designee, the bar committees at Cincinnati, Columbus, and Dayton shall each prepare a written examination which they shall administer in each of the above named cities on the first Tuesday in June and December, or at such other times as may be ordered.

3.0.1 *Designation and Responsibility*

Unless otherwise ordered, in all actions filed in or removed to this court, all parties not appearing in *propria persona* shall be represented of record by a trial attorney who is a member of the bar of this court and who maintains an office for the private practice of law within this district. When two or more parties join in a single pleading only one trial attorney shall be designated. Thereafter, until such designation is changed by order of the court, upon motion, said trial attorney shall be responsible for the action and shall attend all hearings and conferences and the trial

Rules of the United States District Court, Southern District of Ohio, 2.4.1, 2.4.2, 2.4.3, 2.4.4, 3.0.1 (1975).

These rules provide a scheme for the qualification of trial counsel by examination and admission to the bar of the United States District Court for the Southern District of Ohio. But the term "Unless otherwise ordered" employed in 3.0.1 appears

to us to retain in the hands of the District Judge discretion to deal appropriately with any extraordinary case.[2] We do not need in this present appeal to spell out what such a case might be. But for a District Judge to exercise his discretion to allow a person to try a case who was not a member of the bar of the court and who had not qualified by taking the required examination, would at a minimum require a showing that such person was sufficiently learned in the law to be able adequately to represent his client in court. In our instant case the District Judge was asked to allow an accountant with no training in law to try the case. In denying that request he allowed appellant to exercise his right to try the case himself, with the accountant seated at the counsel table to advise with him throughout the trial. We find no abuse of appellant's Sixth Amendment rights.[3]

Appellant also complains that the counts on which he was indicted are duplicitous and that they are fatally at variance. These two arguments, of course, are contradictory but it does seem obvious that Counts 1 and 3, and 2 and 4 charge much the same offense and would be established by the same proofs. Doubtless, for that reason the District Judge made the sentences wholly concurrent. Our review of this record convinces us that what was proved was failure to file and, as a consequence, that the convictions on Counts 2 and 4 pertaining to failure to supply information should be stricken on grounds of merger.

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[2] *Cf. Turner* v. *American Bar Ass'n*, 407 F. Supp. 451, 477-78 (W.D. Wis. 1975).

[3] Appellant relies on *United States* v. *Stockheimer*, 385 F. Supp. 979 (W.D. Wis. 1974), where a District Judge in the United States District Court for the Western District of Wisconsin held that he had the discretion to allow a person who was not a member of a bar association to advise a defendant in a criminal case. The person involved had had legal training and the District Judge held he was qualified to sit with the defendant in court and advise him while he represented himself. This is the same arrangement allowed by the District Judge in our case. We do not consider this case authority for a result opposite to that which we have reached above.

Repeatedly during the trial and at argument before our court appellant sought to contend that he was not due to pay any taxes because he had never received any "legal dollars." He argues that only money which is coined from either gold or silver or immediately backed by gold or silver constitute legal dollars and as a consequence, since he was not paid in any such during 1972 and 1973, he is exempt from taxation under the federal income tax laws. The Eighth Circuit has dealt with this contention in *United States* v. *Daly*, where the court said:

> Defendant's fourth contention involves his seemingly incessant attack against the federal reserve and monetary system of the United States. His apparent thesis is that the only "Legal Tender Dollars" are those which contain a mixture of gold and silver and that only those dollars may be constitutionally taxed. This contention is clearly frivolous.
>
> *United States* v. *Daly*, 481 F.2d 28, 30 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973).

While we agree with this conclusion, we point out that both the Sixteenth Amendment and the Internal Revenue Code deal not with "legal tender" but with taxation of "income." This record is replete with proof that appellant did receive "income" during the years 1972 and 1973.

Appellant also argues that the trial judge, all members of this court, and all members of the United States Supreme Court are disqualified and should recuse themselves because all are named in the civil action in the United States District Court for the Western District of Pennsylvania in which he is a plaintiff. This action has now been dismissed by the United States District Court, although doubtless it is in the appellate process. More importantly, we do not think that the United States courts are so fragile as to be subject to being put out of existence by a civil suit which names all sitting judges. We believe that the District Judge and the members of this court who partciipated in this case are correct in refusing to recuse themselves.

While appellant has many other complaints about the Judge's exclusion of his evidence (designed, for example, to prove that plaintiff was the subject of selective and discriminatory prosecution) and the admission or exclusion of certain other evidence, we have reviewed these complaints and have been able to find no legal merit to them.

We have reviewd the Judge's instructions to the jury and find no error prejudicial to appellant's rights.

Finding no reversible error in the rulings of the court below, and no abuse of appellant's legal or constitutional rights, we affirm the judgment of conviction. On grounds previously stated, we vacate the sentence under Counts 2 and 4. Any suggestion for reduction of sentence must be addressed to the District Court under a Rule 35 motion at the completion of the appellate process in this case.

Appendix "B"

No. 75-1648

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

DEC 7 1977

JOHN P. HEHMAN, C.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ROGER L. WHITESEL,

Defendant-Appellant.

ORDER

Before: EDWARDS, McCREE and LIVELY, Circuit Judges.

On receipt and consideration of a motion for rehearing filed in the above-styled case; and

Noting in said motion no argument which had not been previously considered by the panel which decided the appeal,

Said motion is hereby denied.

Entered by order of the Court

John P. Hehman

Clerk

Appendix "C"

AFFIDAVIT

STATE OF MINNESOTA
COUNTY OF HENNEPIN ss

JORDON C. PETERSON, BEING FIRST DULY SWORN UPON OATH DEPOSES AND SAYS: THAT HE IS THE JORDON C. PETERSON WHO ACTED AS ASSISTANT TO THOMAS STOCKMEISTER IN THE TRIAL BEFORE JAMES E. DOYLE, PRESIDING DISTRICT JUDGE FOR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, CASE NO. [redacted] (UNITED STATES vs. THOMAS F. STOCKMEISTER, [redacted]); THAT AFFIANT ACTED AS SUCH ASSISTANT TO THOMAS STOCKMEISTER PURSUANT TO AN ORDER OF JUDGE DOYLE DATED DECEMBER [redacted], 1976.

AS SUCH ASSISTANT AFFIANT WAS PERMITTED TO MAKE THE OPENING ARGUMENT TO THE JURY; AFFIANT SAT AT THE COUNSEL TABLE WITH THE DEFENDANT; CONDUCTED THE CROSS EXAMINATION OF THE GOVERNMENT WITNESSES; MADE OBJECTIONS TO THE COURT ON IMPROPER TESTIMONY; CONDUCTED THE EXAMINATION OF THE DEFENDANT AND ALL OF THE DEFENDANT'S WITNESSES; MADE THE CLOSING ARGUMENT; IN FACT AFFIANT DID EVERYTHING THAT ANY LAWYER WOULD DO BUT WITH THIS DISTINCTION, AFFIANT WAS ONLY AN ASSISTANT, AND ONLY THE DEFENDANT'S SPOKESMAN. AT NO TIME WOULD JUDGE DOYLE SPEAK TO AFFIANT WITHOUT THE DEFENDANT STOCKMEISTER BEING PRESENT. STOCKMEISTER WAS PRESENT AT ALL DISCUSSIONS AT THE BENCH DURING TRIAL; AND AT ALL CONFERENCES IN COURT CHAMBERS. JUDGE DOYLE CONSIDERED AFFIANT NOT AS STOCKMEISTER'S ATTORNEY NOR EVEN HIS AGENT, AS NO AGENCY WAS CREATED; AFFIANT WAS ONLY DOING WHAT STOCKMEISTER WOULD DO IN DEFENDING HIMSELF AS HIS OWN ATTORNEY PRO SE. STOCKMEISTER WAS SPEAKING AND CONDUCTING HIS OWN TRIAL THROUGH THE PERSON OF JORDON PETERSON AS HIS SPOKESMAN; HIS VOICE, HIS MIND, AND THE CONDUCTOR. IT WAS AS IF STOCKMEISTER WAS SPEAKING AND ACTING THROUGH HIS OWN SHADOW AND WAS JORDON PETERSON.

FURTHER AFFIANT SAYETH NOT.

Jordon C. Peterson

SUBSCRIBED AND SWORN TO BEFORE ME THIS 2nd DAY OF Nov. 1976

Gail Wabden

NOTARY PUBLIC, [redacted] COUNTY, MINNESOTA
MY COMMISSION EXPIRES [redacted]

BEST COPY AVAILABLE

Argument: RIGHT TO COUNSEL, pp5, 6 and 7
from: REPLY BRIEF OF APPELLANT

The Supreme Court of the United States says that the word "counsel" is not limited to mean a "lawyer" or someone "licnesed" to practice law by a State. See Faretta v. California, 43 LW 5004, 5008, ___US___, 95 SCt 2525, 45 LEd2d 562 (1975) where the Court pointed out in footnote 16:

> . . . The first lawyers were personal friends of the litigant, brought into court by him so that he might "take' counsel' with them" before pleading. 1 Pollack & Maitland, History of English Law 211 (1909). . . .

The Colonial Charters did not limit "counsel" to that of a "licensed" lawyer, to wit:

"In Pennsylvania the Frame of Government of 1683 had contained this clause concerning counsel:

> In all courts all persons of all persuasions may . . . personally plead their own cause themselves, or if unable, by their friend . . ." 4/

In Rhode Island, "(t)he Constitution of 1792 provided:

> "In all criminal prosecutions the accused hath a right to be heard by himself

---

4/ Quoted from: The Right to Counsel in American Courts, Wm. M. Beaney, Univ. Mich. Press, 1955.

> and his counsel." 4/

"The New York Constitution of 1777 simply stated that

> "in every trial or impeachment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel, as in civil actions." 4/

The Fundamental Constitution for the Province of East Jersey (1683) states:

> . . . And in all courts persons of all perswasions (sic) may freely appear in their own way, and according to their own manner, and there personally plead their own causes themselves, or if unable, by their friends, no person being allowed to take money for pleading or advice in such cases. 5/

"In both parts of (New) Jersey, East and West, trial by jury found recognition in the early fundamental laws. In West Jersey, where Quakerism predominated and Penn's influence was strong, the charter provisions demonstrate clearly the popular aversion to the legal profession; thus Chapter XXII of the Charter of Fundamental Laws of 1676 reads:

> "That the tryals of all causes, civil and criminal, shall be heard and decided by the virdict (sic) or judgment of twelve hon-

---

5/ Quoted from: The Sixth Amendment in the Constitution, Francis H. Heller.

est men of the neighborhood, only to be summoned and presented by the sheriff of that division, or propriety where the fact or trespass is committed;"

and continues immediately with:

"that no person or persons shall be compelled to fee any attorney or councillor to plead his cause, but that all persons have free liberty to plead his (sic) own cause, if he please . . ." 5/

"In the New Jersey Constitution of 1776 . . . extended a guarantee that

"all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are, or shall be entitled to." 4/

"The Massachusetts Constitution of 1780 declared that

"every subject shall have a right to . . . be fully heard in his defense by himself or his counsel, at his election." 4/

"The Maryland Constitution of 1776 was hardly less explicit in its provision that

"in all criminal prosecutions, every man hath a right . . . to be allowed counsel . . ." 4/

"The New Hampshire Constitution of 1784 stated that

"every subject shall have the right . . . to be fully heard in his defense by himself, and counsel." 4/

"The Independent Republic of Vermont in its Constitution of 1777 declared simply that

"in all prosecutions for criminal offenses, a man hath a right to be heard, by himself and his counsel . . ." 4/

The only time the phrase "counsel learned in the law" appeared in these early American Documents was e.g. "treason, murder, felony, or other capital offense". See Act of South Carolina, 1731. In other words, if your head was at stake, someone "learned in the law" seemed to be guaranteed. The axiom "The exception proves the rule" is applicable here: If counsel "learned in the law" was intended, or an "attorney" or "councillor" were intended, then, it was stated; otherwise, as it is used in Amendment Six, "counsel" means that person in whom the accused chooses to "assist" him.

. . .

Appendix "E"

CC:ATL-CT
JMorton

Regional Commissioner, Internal Revenue Service,
Southeast Region, Attn: ARC, Intelligence

Regional Counsel - Southeast Region AUG 8 1974

Identity Group
Mobile, Alabama

Reference is made to subject July 30, 1974 memorandum which was informally presented to this office for an opinion concerning the feasibility of initiating a package investigation concerning the individuals in subject group. Further reference is made to informal discussions by Joel Morton of this office with your office.

Naturally, the decision whether to investigate or not is entirely that of the District Director; however, it certainly appears that this matter deserves looking into. The Alabama District, as you know, has had good success in regard to its package efforts, for example, that against the chiropractors concerning a Perth type situation.

Basically, each case in the package will naturally have to be legally probative and meet the standard of prosecution of this office: based on prior package experience and Chief Counsel guidelines, a package generally consists of anywhere from five to ten cases; it is also best, however, not specifically required, that all cases in the package be from the same judicial district so that the compliance problem can be emphasized through D.J. to the U. S. Attorney, and the trial judge himself.

This office is available for direct and indirect assistance in connection with further efforts in this project.

/s/ Henry C. Stockell, Jr. JM
Henry C. Stockell, Jr.
Regional Counsel

cc: District Director, Birmingham, Ala.
Attn: Chief, Intelligence Division

bcg

INTERNAL REVENUE RECEIVED AUG 1 1974 CHIEF INTELLIGENCE DIV. BIRMINGHAM

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Appendix "F"

APPLICABLE LAW, etc.

MAGNA CHARTA:

40. To none will we sell, to none deny or delay, right or justice.

45. We will not make men justices, constables, sheriffs, or bailiffs, unless they are such as know the law of the realm, and are minded to observe it rightly.

CONSTITUTION OF THE UNITED STATES OF AMERICA:

Amendment I. Congress shall pass no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV. The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or thins to be seized.

Amendment V. . . . nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

Amendment VI. In all criminal prosecutions the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; . . . to have . . . witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment IX. The enumeration in the Constitution, of certain rights, shall not be contrued to deny or disparage others retained by the people.

Amendment XVI. The Congress shall have power to lay and collect taxes on incomes, . . .

STATUTE PROVISIONS as found in the U.S. Code:

26 USC 6001
6011
6012
6201
6203
6213
7203
7205
7422
7441
7481
7482

28 USC 1654 and Judiciary Act of 1789, Sec. 35: And be it further enacted, That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.

Federal Rules of Criminal Procedure: (FRCP)
Rule 12(b)
Rule 14

Rules of the District Court, Southern District, Ohio
Rule 3.0.1

Code of Federal Regulations: (CFR)
26 CFR 1.6011
26 CFR 1.6012

Balentine's Law Dictionary

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Faretta v California, 43 LW 5004

Heligman v U.S., 497 F2d 448 (CA8 1969)

Turner v Amer. Bar. Assn, 407 FSupp 451

U.S. v Bishop, 412 US 346

U.S. v. Brodson, 155 F2d 407

U.S. v Borchardt, Case No. _____,
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U.S. v Chrane, 529 Fed 1236 (CA5 1976)

U.S. v Douglass, 476 F2d 260, (CA5 1973)

U.S. v Gaar, Case No _____
U.S. D.C., So. Dist. Texas

U.S. v Garner, 44 LW 4323

U.S. v Peterson, ____F2d ____(CA7 1977)

U.S. v Radue, 486 F2d 220 (CA5 1973)

U.S. v Stockheimer, 385 FSupp 979 (Wis. 1974)

U.S. v Sullivan, 274 US 259

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Cupp v. Com. Internal Rev., 65 T.C. 6

Hartman v. Com. Internal Rev. 65 T.C. ___

Supreme Court, U. S.
FILED
MAY 27 1977

No. 76-1378

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROGER L. WHITESEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1378

ROGER L. WHITESEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner argues that the trial court should have permitted him to be represented by an accountant at his trial for failure to file tax returns and for filing false withholding information with his employer.

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on two counts of willfully failing to file income tax returns for 1972 and 1973, in violation of 26 U.S.C. 7203; two counts of willfully failing to supply information for the same years, in violation of 26 U.S.C. 7203; and one count of filing a false Exemption from Withholding Certificate with his employer, in violation of 26 U.S.C. 7205 (App. 1-4).[1] The district court sentenced him

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[1] "App." refers to the appendix filed in the court of appeals.

to two years' imprisonment and fined him $1,500 (Pet. App. 1). The court of appeals affirmed the convictions for failure to file returns and for filing a false withholding certificate, but vacated the judgments and sentences with respect to the charges of willful failure to supply information on the ground that those offenses had been merged into the convictions for failure to file (Pet. App. 8, 10). The judgment of the court of appeals reduced petitioner's fine to $1,000 but had no effect on the prison sentences, which had been imposed concurrently (App. 5).

The evidence showed that for 1972 petitioner filed a tax return form giving no financial information but stating "I plead the Fourth and Fifth Amendments and the United States Constitution" (Pet. App. 2). Petitioner likewise provided no financial information for 1973 but stated on the form "Object, see attachments," and submitted 170 pages of material protesting the income tax system. In August 1972, petitioner filed with his employer an Exemption from Withholding Certificate in which he stated that he had incurred no liability for a federal income tax for 1971 and anticipated incurring none for 1972. Forms W-2 introduced in evidence showed that petitioner's gross wages for 1971, 1972, and 1973, respectively, were $16,634, $19,403, and $19,868 (Pet. App. 2).

1. Petitioner contends (Pet. 13-24) that the trial court improperly refused to allow him to be represented by an accountant rather than an attorney. But it is well settled that a criminal defendant's right to counsel does not include the right of assistance or representation by a lay person. *United States* v. *Cooper*, 493 F. 2d 473, 474 (C.A. 5), certiorari denied, 419 U.S. 859; *United States* v. *Ellsworth*, 547 F. 2d 1096 (C.A. 9), pending

on petition for a writ of certiorari, No. 76-6323; *United States* v. *Jordan*, 508 F. 2d 750 (C.A. 7), certiorari denied, 423 U.S. 842.[2]

2. Petitioner further argues (Pet. 25-45) that the trial court should have required the government to make a pretrial election between the charges of failure to file and failure to supply information. But petitioner was not prejudiced by the inclusion of both of these charges in the indictment because the court of appeals vacated the judgments and sentences with respect to the counts alleging failure to supply information on the ground that they were merged into the convictions for failure to file (see Pet. App. 8, 10). As the court pointed out, "Counts 1 and 3, and 2 and 4 charge much the same offense and would be established by the same proofs" (Pet. App. 8). Since its review of the record confirmed that the proof showed failure to file, the court of appeals properly vacated petitioner's conviction for failure to supply information.[3]

---

[2]The court of appeals held that in certain extraordinary situations a qualified person other than an attorney at law might be permitted to represent a criminal defendant (Pet. App. 7-8). But the court went on to point out that the accountant in question had had no legal training and was therefore not qualified to represent petitioner, although it permitted the accountant to sit at the counsel table and advise petitioner throughout the trial (Pet. App 8).

[3]Petitioner also argues (Pet. 56-57, 60-63) that the amount of his tax liability in connection with the failure to file charge was "a material fact for the Jury to determine" and that the government should have determined his civil liability before prosecuting him for failure to file. But this Court has held that the existence of a tax liability is not an essential element of the offense of willfully failing to file an income tax return. See *Spies* v. *United States*, 317 U.S. 492, 495-496. Moreover, it has long been settled that a determination of a deficiency is not a prerequisite to a criminal tax prosecution. See, *e.g.*, *Guzik* v. *United States*, 54 F.

3. Contrary to petitioner's final argument (Pet. 64-76), the trial court's instructions do not conflict with either *United States* v. *Bishop*, 412 U.S. 346, or *Garner* v. *United States*, 424 U.S. 648. The court correctly charged (App. 86; Pet. 72-73) that the constitutionality of the income tax laws consistently has been upheld. It also properly instructed the jury (App. 87; Pet. 72) that "[a] taxpayer's return which does not contain any information relating to his income, deductions * * * from which a tax can be computed is not a return within the meaning of the law." *United States* v. *Daly*, 481 F. 2d 28, 29 (C.A. 8), certiorari denied, 414 U.S. 1064; *United States* v. *Porth*, 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824.

Petitioner claims (Pet. 66) that the trial court erred in charging that "[i]f a person knows what he is saying is false, and it is not correct in fact, and says it intending for another person to act on it, all the good faith in the world can't make what is false in fact true." This instruction was proper. *United States* v. *Pomponio*, No.

2d 618, 619 (C.A. 7), certiorari denied, 285 U.S. 545; *United States* v. *Commerford*, 64 F. 2d 28, 30 (C.A. 2), certiorari denied, 289 U.S. 759.

Petitioner further claims (Pet. 58-59) that the conviction for filing a false withholding certificate should be reversed because the trial court held that the existence of a tax liability was not a material element of that offense. However, the evidence showed that when petitioner filed the Exemption from Withholding Certificate (see 26 U.S.C. 7205) he falsely stated that he had incurred no income tax liability for 1971 and expected to incur none for 1972 (App. 9, 49); the W-2 forms petitioner received from his employer showed a gross income of $16,634 for 1971 and $19,403 for 1972 (App. 62; Pet. App. 2). Moreover, the trial court instructed the jury that in order to convict on this count it must find that petitioner had willfully made a false statement regarding his tax liability for one of those years (App. 91).

75-1667, decided October 12, 1976. The purport of this instruction was simply that if petitioner did not willfully falsify the certificate he could not be convicted, but if he did willfully falsify he could not have acted in good faith. The court further advised the jury that in order to convict on this count, it had to find that petitioner "knew the requirement of telling the truth and intentionally and with a bad purpose didn't tell the truth * * * *" (App. 91). If anything, these instructions, with their emphasis on "bad purposes," were unnecessarily favorable to petitioner. See *United States* v. *Pomponio*, *supra*.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

MAY 1977.

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*The Solicitor General is disqualified in this case.

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